89-286

Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

WILMA L. ARGUBRIGHT, Individually and as Next Friend of KURT ARGUBRIGHT, a Minor, and as Personal Representative of the Estate of JAMES ARGUBRIGHT, Deceased, and MARIE PAULE KERCKHOF, Individually and as Personal Representative of the Estate of PETER J. KERCKHOF, Deceased, *Petitioners*

v.

BEECH AIRCRAFT CORPORATION, *Respondent*

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and Appendix

Richard N. Countiss
Law Offices of Windle Turley, P.C.
6440 North Central Expressway
1000 University Tower
Dallas, Texas 75206
214/691-4025
Attorneys for Petitioners

Fort Worth Brief Printing Co., 610 South Jennings Avenue, Fort Worth, Texas 76104 Phone 817-332-4070

QUESTIONS PRESENTED

1. Whether the decision of the Court of Appeals for the Fifth Circuit, in this diversity case, conflicts with the substantive law of the State of Texas?

2. Whether the decision of the Court of Appeals for the Fifth Circuit violates the Seventh Amendment of the United States Constitution?

PARTIES TO THE PROCEEDINGS BELOW

1. Wilma L. Argubright, Individually and as Next Friend of Kurt Argubright, a Minor, and as Personal Representative of the Estate of James Argubright, Deceased.
2. Kurt Argubright.
3. Marie Paule Kerckhof, Individually and as Personal Representative of the Estate of Peter J. Kerckhof, Deceased.
4. Counsel: Law Offices of Windle Turley, P.C.
   Dallas, Texas.
5. Beech Aircraft Corporation.
6. Counsel: Cowles & Thompson,
   Dallas, Texas.

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v.

BEECH AIRCRAFT CORPORATION, *Respondent*

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and Appendix

REFERENCE TO OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Fifth Circuit is reproduced in Appendix A. Other pertinent information is reproduced in the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals was entered on March 28, 1989. The Petition for Rehearing was denied on April 24, 1989.

The Supreme Court of the United States has jurisdiction to grant this Petition and review the decision of the Court of Appeals under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND RULES

(1) Amendment VII, U.S. Constitution:
In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

(2) Rule 38(a), Federal Rules of Civil Procedure:
(a) Right Preserved. The right of a trial by jury as declared by the Seventh Amendment of the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

STATEMENT OF THE CASE

In April of 1982, Peter Kerckhof, a flight instructor, and James Argubright, a student pilot, were killed when the privately owned airplane being piloted by Argubright crashed as it was taking off from a small airport near Roanoke, Texas. (TR. Vol. 3, pp. 228-29.) The takeoff was normal until the plane was about one hundred feet above the ground. (TR. Vol. 3, p. 181; Vol. 4, p. 235.) At that point, the plane abruptly pitched up to a seventy degree nose up attitude, climbed to between 125 and 200 feet, stalled, rotated about the left wingtip, and went into a left side spin. (TR. Vol. 4, pp. 235-36.) The plane crashed about four hundred feet from the end of the runway, at a ninety-two degree nose down attitude. (TR. Vol. 4, p. 236.)

The Argubright family and Kerckhof's widow filed this suit against Beech in U.S. District Court under the diversity stat-

ute, 28 U.S.C. §1332(a), alleging that Beech was liable under theories of products liability for defectively designing the plane and for failing to warn of the danger of seat slippage. Beech denied liability and contended Argubright was negligent in his piloting of the plane.

It is undisputed that the crash occurred because the Beech seat in which Argubright was sitting was not latched, and slipped back during takeoff. The sudden slippage caused Argubright to pull back on the control wheel, sending the plane into the steep climb that ended in the fatal stall. (TR. Vol. 1, p. 133, Ex. 1; Vol. 3, pp. 55, 183-84.) It is also undisputed that neither the pre-flight checklist furnished by Beech when the plane was manufactured, nor any other instruction in the plane, contained a warning to position and lock the seat prior to taking off or a warning to refrain from unlocking the seat during flight. (TR. Vol. 3, p. 52; Ex. 26.)

Beech's representative and staff engineer testified that Beech was aware of the danger of seat slippage and considered the positioning and locking of the seat to be an essential flight safety item. (TR. Vol. 3, pp. 52-55; Vol. 4, p. 477; Ex. 26.) And, as the manufacturer, Beech accepted the responsibility to provide flight safety information in order to prevent accidents. (TR. Vol. 3, pp. 55-56.) (See Appendix G.)

Beech finally included the position and lock information on a revised checklist for the plane but there is no evidence that the revised checklist was ever placed in this plane. (TR. Vol. 3, p. 52; Vol. 4, p. 406.) Other manufacturers have long included such a "position and lock seat" warning in their instructions, and the General Aviation Manufacturers Association (GAMA) recommends inclusion of the instruction and warning. (TR. Vol. 3, pp. 84-94; 158-60.)

The inclusion of the information is critical because pilots are taught to rely on the aircraft checklists, not on memory, for

safety. (TR. Vol. 3, pp. 44-52.) Additionally, there was undisputed evidence that not every pilot knows to check his or her seat; if all pilots did know that, there would be no need to include the warning in the instructions. (TR. Vol. 3, pp. 154, 210.) (See Appendix G.)

The jury found that Beech failed to give adequate instructions concerning the seat, that the failure rendered the plane "unreasonably dangerous as marketed" and that the failure was a producing cause of the deaths of Argubright and Kerckhof. (App. pp. F-2–F-3.) The jury failed to find a design defect. (App. p. F-1.)

The jury also found that Argubright was negligent, and assessed 30% of the fault to him. (App. pp. F-3–F-5.) It then awarded the Argubright family $350,000 and Kerckhof's widow $500,000. (App. pp. F-5–F-11.) Judgment was rendered consistent with the verdict. (App. pp. D-1–D-4.)

The Fifth Circuit reversed and rendered, holding that, as a matter of law, Beech had no duty to warn of the danger of seat slippage. (App. pp. A-1–A-7.) Specifically, the Fifth Circuit held:

> [W]e find that the jury could not have reasonably determined that Beech should reasonably have anticipated that student pilots would position their seat but fail to lock it prior to takeoff. Accordingly, we find, as a matter of law, that Beech Aircraft owed no duty to warn Argubright or other intended Musketeer users, i.e. pilots, of the need to lock the seat prior to takeoff. The district court judge erred by allowing the jury to find to the contrary and by denying Beech Aircraft's motions for directed verdict and for judgment notwithstanding the verdict.

(App. p. A-7.) This petition is timely presented seeking reversal of that decision.

REASONS FOR GRANTING THE WRIT

1. The Issues Are Important.

The immediate issue in this case is the extent to which aircraft manufacturers must tell consumers about acknowledged dangers in their products. Beech is a part of a large national industry whose products are used by millions of citizens. When a federal court, by judicial fiat, exempts such an industry from an important safety factor, the matter is significant and merits review by this Court. This is emphasized by the fact that the Fifth Circuit has eliminated the need for a warning recommended by the General Aviation Manufacturers Association and given by all major aircraft manufacturers.

Underlying the social issue are two critical legal issues: (1) Does the *Erie* doctrine have any viability in the Fifth Circuit? and (2) Does the Seventh Amendment have any viability in the Fifth Circuit? Petitioners are well aware that the U.S. Supreme Court usually declines to review tort litigation, especially in diversity cases. Where, however, the Supreme Court and the U.S. Constitution have established standards by which the intermediate appellate courts are to review diversity cases, and those standards, and principles of federalism, are ignored, only this Court can correct the errors and remind the lower courts of their responsibility within the judicial system. In this case, the Fifth Circuit has ignored the substantive law of Texas and has created a new federal tort rule that is contrary to state law. The Fifth Circuit did not cite, or indicate that it even sought, a Texas case to support its pronouncement of Texas law. It also ignored a jury verdict that has ample evidentiary support. And, in doing so, it has written an opinion, to be published, that contains numerous factual misstatements.

For those reasons, this case is important and should be reviewed by the U.S. Supreme Court. Additionally, as will be

illustrated, the Fifth Circuit has so far departed from the accepted course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

2. The Decision Violates *Erie Railroad Co. v. Tompkins* By Failing To Follow Texas Law.

In *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) the U.S. Supreme Court established the rule that, except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any diversity case is the law of the State. 304 U.S. at 78. *Erie* was formulated to be certain that in diversity cases the outcome of litigation in federal court is the same as it would be if the case were tried in a state court. *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 109 (1945).

As pertinent to this case, the principles of *Erie* are the same today as in 1938. *Felder v. Casey*, ___ U.S. ___ , 108 S.Ct. 2302 (1988). There is no federal common law, *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981), in state tort cases brought under diversity jurisdiction. *Miree v. DeKalb County, Ga.*, 433 U.S. 25, 28-29 (1977). Federal courts are not free to devise and apply their own notions of the law; they must apply state law to state claims. *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. at 640. Accord: *Dueringer v. General American Life Ins. Co.*, 853 F.2d 283 (5th Cir. 1988). Thus, the federal courts are "bound to construe Texas law in the same way that its Courts would if confronted with the same issues. . . ." *In re Air Crash at Dallas/Fort Worth Airport*, 856 F.2d 28, 30 (5th Cir. 1988).

Within the *Erie* context, the federal court's opinion of state law is of no importance. The Court is only to apply the law; it cannot ignore it, subvert it or re-write it.

The Fifth Circuit has not followed *Erie* in this case. The opinion, while purporting to recite Texas law, cites no Texas cases, quotes no Texas statutes, and reaches a result that is contrary to Texas law.

A. The "No Duty" Defense Pronounced By The Fifth Circuit Does Not Exist In Texas.

In negligence and products liability cases in Texas, an absolute defense based on "no duty" has been abolished. Instead, the reasonableness of the conduct of the various actors is comparatively evaluated by the fact finder. *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 428-438 (Tex. 1984); *Keen v. Ashot Ashkelon, Ltd.*, 748 S.W.2d 91 (Tex. 1988); *Parker v. Highland Park, Inc.*, 565 S.W.2d 512 (Tex. 1978); *Bennett v. Span Industries, Inc.*, 628 S.W.2d 470, 473 (Tex.App.-Texarkana 1981, writ ref'd n.r.e). It is not even proper to instruct a Texas jury on the "no duty" concept promulgated by the Fifth Circuit in this case. *Magro v. Ragsdale Bros., Inc.*, 721 S.W.2d 832, 836 (Tex. 1986).

Magro, a Texas Supreme Court decision that is binding on the Fifth Circuit, clearly illustrates the Fifth Circuit's error. The "no duty" defense was urged and the defendant requested, but was denied the following jury instruction:

> There is no duty to warn a group or class of users who possess special knowledge or expertise concerning the dangerous characteristics of the product.

In holding that the refusal to give the instruction was proper the Texas Supreme Court held that "appropriate special issues ask the jury about the existence of a product defect and its causal connection to the accident. Any additional instructions serve merely to distract the jury's attention." 721 S.W.2d at 836.

The Court of Appeals' opinion in *Magro*, styled *Ragsdale Bros, Inc. v. Magro*, 693 S.W.2d 530, 540 (Tex.App.-San Antonio, 1985), rev'd o.g. 721 S.W.2d 832 (1986) pointed out that the doctrine of "no duty" in this context is part of the "assumption of risk" defense that is now controlled by *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 428 (Tex. 1984).

Duncan is also binding on the Fifth Circuit. Under it, the no duty concept that is now a part of the assumption of risk defense is handled as follows:

> In cases not controlled by Art. 2212a, the system we adopt will allow comparison of plaintiff's conduct, whether it is characterized as assumption of risk, misuse, or failure to mitigate or avoid damages, with the conduct or product of a defendant, whether the suit combines crashworthiness or other theories of strict products liability, breach of warranty, or negligence. Cf. Uniform Comparative Fault Act 1 (1977) (proposing similar statutory system.) Assumption of risk and misuse will no longer be separate defenses, but will be subsumed under the more familiar notion of contributory negligence.

665 S.W.2d at 428.

Thus, in this case, the trial court submitted the questions exactly as required by Texas law and the jury allocated causation (assigning 30% to Argubright) exactly as contemplated by Texas law. Most important, the jury made that allocation after *hearing conflicting evidence* on whether the seat danger was open and obvious to Argubright. (App. G; TR. Vol. 3, pp. 44-55, 154, 210; Vol. 4, pp. 420-21, 477.)

To hold, as the Fifth Circuit does, that the Argubright and Kerckhof families are absolutely barred from recovery because the Court thinks the danger was "open and obvious" is violative of all of the Texas cases cited above. At least when there is a fact issue, the problem is supposed to be resolved by

the jury within the context of comparative causation, not by a federal court's idea of what a person should or should not know about the danger of an airplane seat. When there is no direct evidence of knowledge, but there is conflicting circumstantial or expert evidence on the extent to which the danger was apparent, nothing in Anglo-American jurisprudence gives a federal court the right to ignore that evidence. (Vol. 3, p. 154; Vol. 4, pp. 421, 475.) It is a jury matter and the jury resolved the conflict by assigning a percentage of fault to Mr. Argubright. Under Texas law, that is where it should rest.

B. The "No Duty" Concept Is Not Applied To Beginners.

Even when the concept of no duty to warn of open and obvious danger was viable in Texas, it was applied only to those with special expertise and knowledge. The Fifth Circuit, in earlier cases following Texas law, characterized it as "No Duty to Warn Experts." See, e.g., *Koonce v. Quaker Safety Products & Mfg. Co.*, 798 F.2d 700, 715 (5th Cir. 1986). As the Texas court said in *Pearson v. Hevi-Duty Elec.*, 618 S.W.2d 784, 787 (Tex.Civ.App.-Houston [1st Dist.] 1981, writ ref'd n.r.e.), "The adequacy of a warning cannot be evaluated apart from the knowledge and expertise of those who may reasonably be expected to use the product." The *Pearson* court then held that the adequacy of a warning "is normally a question for the jury." 618 S.W.2d at 787. Accord: *Pavlides v. Galveston Yacht Basin, Inc.*, 727 F.2d 330, 338-39 (5th Cir. 1984); *Ragsdale Brothers, Inc. v. Magro*, 693 S.W.2d 530, 536 (Tex.App.-San Antonio 1985) rev. o.g. 721 S.W.2d 832 (1986); *Hamilton v. Motor Coach Industries, Inc.*, 569 S.W.2d 571, 576-78 (Tex.Civ.App.-Texarkana 1978, no writ).

The same rule was set out in *Lopez v. Aro Corp.*, 584 S.W.2d 333, 336 (Tex.Civ.App.-San Antonio 1979, writ ref'd n.r.e.) where the court held that a manufacturer's warning cannot be

evaluated apart from the knowledge or expertise of those reasonably expected to use the product.

That is the Texas law on the subject. Even Beech does not argue for the unqualified rule pronounced by the Fifth Circuit. (App. Br. pp. 17-18.)

The Fifth Circuit does not discuss the evidence pertaining to the primary element of an open and obvious defense – Mr. Argubright's expertise and knowledge – because there is no evidence that he had any special expertise and knowledge. He was a novice pilot, just learning to fly. (Vol. 3, pp. 179, 192; Vol. 4, pp. 232, 314.)

At oral argument of this case, and again in the opinion, the Fifth Circuit used the analogy of an automobile seat as an example of what "anyone knows." Of course, "anyone" who has ever taught their child to drive knows the Fifth Circuit's assumption is wrong, and in this case Mr. Argubright was the equivalent of a child learning to drive. (Vol. 4, pp. 232, 314; Vol. 3, pp. 179, 192.) More important, there was evidence that "anyone" does *not* know what the Fifth Circuit says it knows.

In order to reach the result it desired, the Fifth Circuit ignored one of the elements of the open and obvious defense in Texas and ignored the record in this case. It also ignored the *Erie* doctrine.

C. The Fifth Circuit Makes No Attempt To Determine Texas Law On The Question.

Perhaps the authorities cited in the opinion best illustrate the Fifth Circuit's disdain for Texas law and principles of federalism. The opinion cites only three cases, all federal decisions, for its conclusion. Yet, those cases either do not support the Court's conclusion or are incorrect statements of Texas law. The *Koonce* case, *supra*, points out that the need to instruct "in light of the user's expertise is generally a question

for the jury." 798 F.2d at 716. *Middleton v. Harris Press and Shear, Inc.*, 796 F.2d 747 (5th Cir. 1986) recognizes that the independent "no duty" defense has been abolished in Texas law, but applies it anyway, citing *Martinez v. Dixie Carriers, Inc.*, 529 F.2d 457 (5th Cir. 1976) as authority. 796 F.2d at 751. The holding in *Middleton* is in direct conflict with the holding of the Texas Supreme Court in *Magro v. Ragsdale Bros., Inc., supra.* Also, *Martinez*, cited in *Middleton* and by the Court in this case, is an admiralty case decided under federal common law. *Texas Industries, Inc. v. Radcliff Materials, Inc., supra* at 642.

The Fifth Circuit cites no Texas cases; it does not attempt to determine Texas law; and it does not refer to the *Erie* principles that are supposed to guide it. Instead, it pronounces a rule and reaches a result that will not be found in any Texas cases. If *Erie* is still alive, the U.S. Supreme Court should remind the Fifth Circuit of its duty.

3. The Decision Violates The Seventh Amendment To The United States Constitution.

The Seventh Amendment forbids re-examination of any fact found by a jury except according to the rules of common law. U.S. Const., Amend. VII. That language means exactly what it says. *Wood v. Diamond M Drilling Co.*, 691 F.2d 1165, 1168 (5th Cir. 1982) cert. den. 460 U.S. 1069 (1983). No appellate court can "reevaluate the conflicting evidence and mandate a result opposite from that reached by the jury." *Basham v. Pennsylvania Railroad Co.*, 372 U.S. 699 (1963). In *Tennant v. Peoria and P.U. Railway Co.*, 321 U.S. 29 (1944), the Supreme Court concluded an eloquent defense of the Seventh Amendment by pointing out that "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or con-

clusions or because judges feel that other results are more reasonable." 321 U.S. at 35.

Here, there was ample testimony that a warning was required. This was testimony that not every pilot knows to check and lock the seat. (TR. Vol. 3, pp. 154, 210.) There was testimony that pilots are taught to rely on the checklist, not memory, for safety items. (TR. Vol. 3, pp. 44-52.)

And there was testimony that Beech was aware of the danger of an unlocked seat, considered the positioning and locking of the seat an essential safety item and accepted the responsibility for providing flight safety information to pilots. (TR. Vol. 3, pp. 52-55; Vol. 4, p. 477.) (See Appendix G.)

Thus, there was evidence of an uninformed consumer, a danger, a realization of that danger by the manufacturer, and a tragedy directly resulting from the failure of the manufacturer to warn of that danger. Texas adopted §402A of the Restatement of Torts so its citizens would have a remedy under those facts, and a federal court is not empowered to cancel that remedy.

Perhaps testimony by Beech's own expert witness best illustrates the error of the Fifth Circuit. Mike McClure testified, in contradiction of earlier evidence, that the danger of seat slippage was not foreseeable:

> Q. You were talking with Mr. Cowles about some of the reasons why that Beechcraft didn't put this on the checklist to start with. Do you recall that testimony?
> A. In my opinion, yes, sir.
> Q. Well, I'm speaking from your opinion again, now. Isn't it true that prudent aircraft design anticipates rather than sits back and waits for some tragedy to occur and then responds, doesn't it?
> A. Well, of course you try to, but you can't foresee each and everything that might happen, you just can't.

Q. *But we know that it is foreseeable that seat slippage can occur in a movable seat?*

A. *Maybe you know that, but I don't know that.*

(S.F. Vol. 4, pp. 420-421.) (Emphasis Added.)

Yet, with Beech *denying* that it could foresee the danger of seat slippage, the Fifth Circuit finds, by judicial decree, that Beech has no liability because "anyone knows" that there *is* a danger of seat slippage.

The Seventh Amendment was adopted to prevent that kind of judicial fact finding. The Amendment has no meaning if the Supreme Court will not enforce it in this case.

4. The Opinion Of The Fifth Circuit Contains Numerous Factual Misstatements.

Analysis of the Fifth Circuit's opinion, and illustration of its legal errors, is hampered by numerous factual misstatements in the opinion. The following quotation which contains five factual errors, illustrates the problem (App. p. A-4):

> The jury returned a verdict stating that the seat mechanism was, in fact, not defectively designed, and thus ruled out the strict liability claim. The jury did, however, agree with the plaintiffs' second allegation, that Beech negligently failed to warn the decedents of the risk of leaving the seat unlocked, or to instruct in the pre-flight checklist that the seat be locked and left locked prior to and during the takeoff. The jury further assessed 30% comparative negligence against Argubright alone, and awarded a net amount of $375,000 to Argubright's survivors, and $500,000 to Kerckhof's widow. Beech filed a post-trial motion for judgment n.o.v., which was denied by the district court.
>
> On appeal, Beech argues that the district court erroneously denied the motion for judgment n.o.v. Beech urges that Beech could not have been negligent because the district court should have found, as a matter of law,

> that Beech possessed no duty to warn Argubright of the risks of failing to lock properly the pilot's seat.

The factual errors, in order, are:

(1) The jury did not return a verdict stating that the seat mechanism "was in fact, not defectively designed, . . ." Instead, the jury *failed to find* by a preponderance of the evidence that the seat *was* defectively designed. There is a substantial legal difference between a finding and a non-finding. *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex. 1989). Contrary to the opinion, there is no finding that the seat "was in fact not defectively designed."

(2) The jury did not "rule out" the strict liability claim or find "that Beech negligently failed to warn the decedents" of seat dangers. *No negligence issues against Beech were even submitted.* Instead, after failing to find a design defect, the jury went on to other strict liability issues, finding that Beech failed to adequately instruct as to seat adjustment and locking, that the failure rendered the airplane unreasonably dangerous as marketed and that the failure was a producing cause of death. (App. pp. F-2–F-3.) The sole basis for Beech's liability is strict liability under §402A of the Restatement of Torts, adopted as part of the Texas substantive law in *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787, 788-90 (Tex. 1967). Yet, the Fifth Circuit says it is resolving a negligence case, for which there are no negligence or proximate cause findings.

(3) In describing the non-existent "negligence" findings, the Fifth Circuit says the jury found that Beech failed "to instruct in the pre-flight checklist . . . ." There is no finding that limits the failure to the pre-flight checklist. The "failure to instruct" finding is generic and all inclusive. (App. p. F-2.)

(4) The Fifth Circuit says the jury "assessed 30% comparative negligence against Argubright alone . . . ." There is no

"comparative negligence" finding by the jury. There is instead a comparative causation finding. (App. p. F-5.) There is a substantial factual and legal difference between comparative negligence and comparative causation. *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 427-30 (Tex. 1984).

(5) The Fifth Circuit says Beech argues that it "could not have been found negligent" for various reasons. Beech does not make such an argument, or any other negligence argument, because there are no negligence findings against it. (Beech's App. Br. pp. 4-21.)

There are several other factual misstatements, in other portions of the opinion. For example, the Fifth Circuit says a revised checklist "was sent to, and received by, owners of the aircraft involved in Argubright's crash." That statement is both incorrect and misleading. The revised checklist was received by an owner (not "owners"). He was a previous owner (not the present owner). The revised checklist was not in the plane, and there was no evidence that it had ever been in the plane or had ever been seen by Mr. Argubright or Mr. Kerckhof. (TR. Vol. 3, p. 52; Vol. 4, p. 406; Ex. 26.)

The Fifth Circuit then states that the argument by the Argubright and Kerckhof families that pilots rely on checklists "undermines the plaintiffs' contention that some additional warning was necessary. The plaintiffs apparently assume that the pilot should have been given additional reasons to think about the dangers resulting from a loose seat." If those statements are intended to convey the Fifth Circuit's belief that the revised checklist, with the warning, was in use in the plane at the time of the crash, then the Fifth Circuit's evaluation of the record is wrong. As just noted, the revised checklist was not in the plane and, so far as this record indicates, had never been in the plane.

If the Fifth Circuit is saying the Argubright and Kerckhof families contend that a checklist warning *and* some additional warning is required, the Fifth Circuit is wrong again. The families contend that a warning should have been on the checklist when it was first put into the plane. They contend that, absent that, a warning elsewhere in the plane would have been proper. They do not contend that both were required.

Many of the foregoing misstatements were pointed out to the Fifth Circuit in the Motion for Rehearing, but the court ignored the information and published the opinion with the errors.

Perhaps the court's numerous legal errors flow from its erroneous analysis of the factual record. In any event, under our system of laws the parties are entitled to a decision based on the trial court record. They did not receive it here.

CONCLUSION

The U.S. Supreme Court has established principles of decision that are binding on the lower courts. Those principles, and binding Constitutional guidelines, were ignored in this case and in the process, the Fifth Circuit set bad policy for the millions of persons within its jurisdiction.

For the foregoing reasons, Petitioners respectfully request the U.S. Supreme Court to grant this Petition for Writ of Certiorari and grant to them all relief to which they are entitled.

Respectfully submitted,

LAW OFFICES OF
WINDLE TURLEY, P.C.

Richard N. Countiss
State Bar No. 04887000

6440 North Central Expressway
1000 University Tower
Dallas, Texas 75206
214/691-4025

Attorneys for Petitioners

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-2177

WILMA L. ARGUBRIGHT, Individually and as Next Friend of KURT ARGUBRIGHT, a Minor, ETC., ET AL.,
Plaintiffs-Appellees, Cross-Appellants,

v.

BEECH AIRCRAFT CORPORATION,
Defendant-Appellant, Cross-Appellee.

March 28, 1989

Products liability action was brought against airplane manufacturer to recover for death of student pilot and instructor. The United States District Court for the Eastern District of Texas, Paul N. Brown, J., entered judgment on jury verdict for plaintiffs, and appeal was taken. The Court of Appeals, Little, District Judge, sitting by designation, held that, under Texas law, danger of unlocked pilot seat during takeoff was sufficiently obvious that manufacturer of private airplane, who had included seat lock in preflight checklist, could not be held liable for failure to provide some additional warning.

Reversed and rendered.

1. Federal Civil Procedure 2603, 2609

Court should grant motion for judgment n.o.v., just as motion for directed verdict, only if nonmoving party has failed to present substantial evidence of such quality and weight that reasonable and fair-minded persons in exercise of impartial judgment might reach different conclusions; court should allow all reasonable inferences to be drawn in nonmovant's

favor, but also must consider all evidence in case, rather than just evidence favorable to nonmovant.

2. Aviation 13

Under Texas law, danger of unlocked pilot seat during take-off was sufficiently obvious that manufacturer of private airplane, who had included seat lock in preflight checklist, could not be held liable for failure to provide some additional warning.

Appeals from the United States District Court For the Eastern District of Texas.

Before CLARK, Chief Judge, HIGGINBOTHAM, Circuit Judge, and LITTLE,* District Judge.

LITTLE, District Judge:

This diversity action raises the question under Texas law of when a potential hazard in a product may be deemed so open and obvious as to obviate any duty of the manufacturer to warn prospective users. Finding that the instant hazard was sufficiently obvious, we reverse the judgment entered by the district court against the manufacturer.

The fatal injuries which gave rise to this lawsuit occurred on 27 April 1982 when the plane carrying the decedents, James L. Argubright and Peter J. Kerckhof, crashed just after take-off. Argubright was acting as pilot, under the direction of Kerckhof, the training instructor. The two were operating a plane manufactured by Beech Aircraft Corporation ("Beech"), known as the Musketeer model B-23, and had taken off and landed in the same plane several times prior to the accident on the same day.

*District Judge of the Western District of Louisiana, sitting by designation.

The parties agree that the accident occurred when, for some reason, the pilot's seat occupied by Argubright was allowed to be unlocked during the takeoff. The mechanism for position adjustment of the Musketeer pilot's seat functions similarly to that of an automobile seat. The seat slides fore and aft on a pair of runners, and locks into position when a pin on the seat drops into one of several holes spaced intermittently along the length of the runner. A pilot desiring to adjust his seat must manually unlock and slide the seat into position. The pilot must then release the positioning control, and slide the seat forward or back a slight amount until it locks into place. Just as a car seat, the pilot's seat audibly "clicks" into position when it locks.

The parties dispute the effect of an unlocked seat. The plaintiffs contend that an unlocked seat could go unnoticed until pushed by takeoff forces, thus making accidents more likely. Beech, on the other hand, points to considerable evidence that the seat would slide during more gentle pre-takeoff maneuvers, thereby alerting the pilot or else causing the seat to lock automatically. Beech argues that Argubright must therefore have unlocked his seat and attempted to reposition it during the actual takeoff. The plaintiffs dispute that claim, contending that Argubright had unlocked the seat prior to takeoff and then innocently failed to lock it.

At any rate, the forces of the takeoff caused Argubright's seat to slide suddenly and sharply backward. This movement caused the steering controls being held at the time by Argubright to be pulled back simultaneously with Argubright, thus resulting in abrupt and uncontrolled changes in direction of the aircraft. The plane then stalled, spun to the left, and crashed at an angle virtually perpendicular to the ground.

The survivors filed this products liability action against Beech, alleging theories of both strict liability and negligence. The plaintiffs argued first that Beech defectively designed the

pilot's seat in such a manner as to allow the seat to slide all the way back on its runner, rather than automatically relocking, if left unlocked prior to takeoff by the pilot. The jury returned a verdict stating that the seat mechanism was, in fact, not defectively designed, and thus ruled out the strict liability claim. The jury did, however, agree with the plaintiffs' second allegation, that Beech negligently failed to warn the decedents of the risk of leaving the seat unlocked, or to instruct in the pre-flight checklist that the seat be locked and left locked prior to and during the takeoff. The jury further assessed 30% comparative negligence against Argubright alone, and awarded a net amount of $375,000 to Argubright's survivors, and $500,000 to Kerckhof's widow. Beech filed a post-trial motion for judgment n.o.v., which was denied by the district court.

On appeal, Beech argues that the district court erroneously denied the motion for judgment n.o.v. Beech urges that Beech could not have been negligent because the district court should have found, as a matter of law, that Beech possessed no duty to warn Argubright of the risks of failing to lock properly the pilot's seat. Beech also argues that it satisfied any duty that may have existed by supplying the plane's owner in 1979 with a revised manual, pursuant to Federal Aviation Administration directive, which contained pertinent warning information.

[1] A court should grant a motion for judgment n.o.v., just as a motion for directed verdict, only if the nonmoving party has failed to present "substantial evidence . . . of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions." *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (en banc). The court should allow all reasonable inferences to be drawn in the nonmovant's favor, but must also consider all evidence in the case, rather than just the evidence favorable to

the nonmovant. *Id.* "A scintilla of evidence is insufficient to present a question for the jury." *Id.*

Product liability doctrine governing the manufacturer's duty to warn is well settled in Texas. The absence of adequate warnings or directions may render a product defective and unreasonably dangerous, even if the product has no manufacturing or design defects. However, there is no duty to warn of dangers obvious to the user of the product. Whether there is a duty to warn and the adequacy of warnings given must be evaluated in connection with the knowledge and expertise of those who may reasonably be expected to use or otherwise come in contact with the product as it proceeds along its intended marketing chain. *Koonce v. Quaker Safety Products & Mfg.*, 798 F.2d 700, 716-17 (5th Cir. 1986); *Middleton v. Harris Press and Shear, Inc.*, 796 F.2d 747, 751 (5th Cir. 1986); *Martinez v. Dixie Carriers, Inc.*, 529 F.2d 457, 464-65 (5th Cir. 1976).

[2] Plaintiffs point to the practice, taught to all pilots, of relying upon a preflight checklist, rather than a pilot's individual judgment, in order to ensure safe procedure. This practice recognizes that the sudden dangers accompanying flight make it desirable to adhere to a routine, rather than to make individualized judgments about safety requirements. Plaintiffs contend that the checklist practice, and the inclusion of the seat lock on some checklists, created a duty upon Beech to warn pilots that their seats should be locked before takeoff. Although we need not decide whether inclusion of a checklist item discharges the manufacturer's duty to warn, we are constrained to observe that Beech did in fact include the seat lock in the 1979 pre-flight checklist which was transmitted to owners of Beech Musketeers. It is undisputed that the revised checklist was sent to, and received by, owners of the aircraft involved in Argubright's crash.

Moreover, the practice of relying upon the checklist undermines the plaintiffs' contention that some additional warning was necessary. The plaintiffs apparently assume that the pilot should have been given additional reasons to think about the dangers resulting from a loose seat. The whole point of the checklist procedure, however, is to replace individualized judgments about dangers with a routine responsive to those dangers. The use of such a routine only underscores the absence of any duty upon Beech to direct pilots' attention back to open and obvious dangers.

The danger in this case results from the possibility that an unlocked pilot's seat may slip backward and deprive the pilot of control of his aircraft. As anyone who has ever driven an automobile knows, stable and secure operation of the steering wheel, pedals, and other controls requires the driver's seat to be firmly positioned. The danger that an unlocked seat could slide back, making it difficult or impossible to operate safely, or even to reach, those controls, is open and obvious to any reasonable driver.

These dangers are no less obvious to pilots, even to novice pilots acting under the direction of a flight instructor. The pilot, just as the automobile driver, would, through the exercise of common sense, inately appreciate the difficulty in reaching and stably operating the controls and foot pedals from a seat which had not been secured into position. Furthermore, any pilot would know that the altitude is regulated by sliding the control back and forth between the pilot's body and the control panel – parallel to the movement of the pilot's seat. A manufacturer should be allowed to rely on the pilot's awareness that constant positioning and smooth adjustment of the altitude control would be difficult or impossible, especially during the critical moments and high forces of the takeoff, from a seat that was able to move freely in the same direction as the control.

The parties dispute whether Argubright unlocked his seat during takeoff, something that even the plaintiffs' expert referred to as "irrational" and violative of "common sense." We need not resolve that question, for we find that the jury could not have reasonably determined that Beech should reasonably have anticipated that student pilots would position their seat but fail to lock it prior to takeoff. Accordingly, we find, as a matter of law, that Beech Aircraft owed no duty to warn Argubright or other intended Musketeer users, i.e. pilots, of the need to lock the seat prior to takeoff. The district court judge erred by allowing the jury to find to the contrary and by denying Beech Aircraft's motions for directed verdict and for judgment notwithstanding the verdict.

Our decision renders moot the cross-appeal filed by the plaintiffs in this action. The cross-appeal is therefore DISMISSED.

REVERSED and RENDERED.

U.S. COURT OF APPEALS FILED MAR 28 1989,
GILBERT F. GANUCHEAU, CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-2177

D.C. Docket No. S-84-116-CA

WILMA L. ARGUBRIGHT, Individually and as
Next Friend of KURT ARGUBRIGHT,
A Minor, ETC., ET AL.,
Plaintiffs-Appellees, Cross-Appellants,

v.

BEECH AIRCRAFT CORPORATION,
Defendant-Appellant, Cross-Appellee.

Appeals from the United States District Court
for the Eastern District of Texas

Before CLARK, Chief Judge, HIGGINBOTHAM,
Circuit Judge, and LITTLE,* District Judge.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Courrt that the judgment of the District Court in this cause is reversed and rendered, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court. IT IS FUR-

*District Judge of the Western District of Louisiana, sitting by designation.

THER ORDERED that the cross-appeal in this cause is dismissed.

IT IS FURTHER ORDERED that plaintiffs-appellees pay to defendant-appellant the costs on appeal, to be taxed by the Clerk of this Court.

March 28, 1989

ISSUED AS MANDATE:

OP-JDT-11

U.S. COURT OF APPEALS FILED APR 24 1989,
GILBERT F. GANUCHEAU, CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-2177

WILMA L. ARGUBRIGHT, Individually and as
Next Friend of KURT ARGUBRIGHT,
A Minor, ETC., ET AL.,
Plaintiffs-Appellees, Cross-Appellants,

v.

BEECH AIRCRAFT CORPORATION,
Defendant-Appellant, Cross-Appellee.

Appeals from the United States District Court
for the Eastern District of Texas

ON PETITION FOR REHEARING
(April 24, 1989)

Before CLARK, Chief Judge, HIGGINBOTHAM,
Circuit Judge, and LITTLE,* District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above titled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ [signature illegible]
Chief Judge

REHG-4

CLERK'S NOTE: SEE FRAP AND LOCAL RULES 41
FOR STAY OF THE MANDATE.

*District Judge of the Western District of Louisiana, sitting by designation.

FILED U.S. DISTRICT COURT EASTERN DISTRICT
OF TEXAS NOV 27 1987, MURRAY L. HARRIS, CLERK,
BY DEPUTY DENISE LOVELACE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

Civil Action No. S-84-116-CA

WILMA L. ARGUBRIGHT, Individually and as Next Friend of KURT ARGUBRIGHT, A Minor, and as Personal Representative of the Estate of JAMES LEWIS ARGUBRIGHT, Deceased; MARIE PAULE KERCKHOF, Individually and as Personal Representative of the Estate of PETER J. KERCKHOF, Deceased,
Plaintiffs,

v.

BEECH AIRCRAFT CORPORATION,
Defendant.

JUDGMENT

On the 15th day of September, 1986, came on to be heard the above cause of action for trial before a jury and the parties appearing in person and by their attorneys of record announced ready for trial.

At the conclusion of the evidence, the Court submitted its instructions and questions to the jury. The jury returned a verdict on September 18, 1986, incorporated herein by reference, finding for Plaintiffs against Defendant Beech Aircraft Corporation. The jury found:

1. That the Beech Muskateer aircraft was not defectively designed in its seat adjustment and locking assembly;

2. That Beech Aircraft Corporation failed to adequately instruct as to seat adjustment and locking with respect to the Beech Muskateer aircraft;

3. That such failure to adequately instruct as to seat adjustment and locking with respect to the Beech Muskateer aircraft rendered the Beech Muskateer aircraft unreasonably dangerous as marketed;

4. That such failure to instruct as to seat adjustment and locking was a producing cause of the deaths of James Lewis Argubright and Peter J. Kerckhof;

5. That James Lewis Argubright's operation of the Beech Muskateer on the occasion in question was negligent;

6. That James Lewis Argubright's negligent operation of the Beech Muskateer on the occasion in question was a proximate cause of the crash;

7. That Peter J. Kerckhof's instruction to James Lewis Argubright in the operation of the Beech Muskateer on the occasion in question was not negligent;

8. That Beech Aircraft Corporation's product contributed 70%, James Lewis Argubright's negligence contributed 30%, and Peter J. Kerckhof contributed 0% to the causes of the crash.

The jury found the total compensatory damages in the past and future for all Plaintiffs in the total sum of $850,000.

The damages awarded to each Plaintiff were allocated as follows:

PECUNIARY LOSS

	PAST	FUTURE
Wilma Argubright	$100,000	$200,000
Kurt Argubright	18,000	32,000
Marie Paule Kerckhof	75,000	425,000

LOSS OF COMPANIONSHIP AND SOCIETY

	PAST	FUTURE
Wilma Argubright	0	0
Kurt Argubright	0	0
Marie Paule Kerckhof	0	0

MENTAL ANGUISH AND GRIEF

	PAST	FUTURE
Wilma Argubright	0	0
Kurt Argubright	0	0
Marie Paule Kerckhof	0	0

It appears to the Court that a 30% reduction in the past and future damages as found by the jury should apply to all damages of the Plaintiffs Wilma and Kurt Argubright.

It further appears to the Court that prejudgment interest on past damages of all Plaintiffs accrued at the legal rate of 10% compounded daily from October 27, 1982, until the date this judgment is signed.

It is therefore, ORDERED, ADJUDGED AND DECREED that the total principal and pre-judgment interest as of November 24, 1987 be apportioned among the Plaintiffs as follows on past damages:

	PRINCIPAL		PRE-JUDGMENT INTEREST		TOTAL
Wilma Argubright	$70,000	+	$46,290.95	=	$116,290.95
Kurt Argubright	12,600	+	8,333.34	=	20,932.34
Marie Paule Kerckhof	75,000	+	49,597.49	=	124,597.49

It further appears to the Court that as of November 24, 1987, the prejudgment interest per day on the past damages of Wilma Argubright was the sum of $31.80.

It further appears to the Court that as of November 24, 1987, the prejudgment interest per day on the past damages of Kurt Argubright was the sum of $22.72.

It further appears to the Court that as of November 24, 1987, the prejudgment interest per day on the past damages of Marie Paule Kerckhof was $34.07.

It is hereby ORDERED, ADJUDGED AND DECREED that the future damages be apportioned between the Plaintiffs as follows:

FUTURE PECUNIARY LOSS

Wilma Argubright	$140,000
Kurt Argubright	22,400
Marie Paule Kerckhof	425,000

It is therefore ORDERED, ADJUDGED AND DECREED that Plaintiffs recover from Defendant Beech Aircraft Corporation the sum of $745,000.00 in actual damages, together with prejudgment interest of $104,221.78 on past damages of Plaintiffs calculated at the rate of 10% compounded daily from October 27, 1982, until November 24, 1987, plus the daily rate of pre-judgment interest until the date of signing this Judgment.

It is further ORDERED, ADJUDGED AND DECREED that Plaintiffs recover post-judgment interest at the rate of 6.93% from the date of signing of this Judgment and costs of Court.

SIGNED this 27th day of November, 1987.

/s/ Paul Brown
United States District Judge

FILED U.S. DISTRICT COURT EASTERN DISTRICT
OF TEXAS FEB 2, MURRAY L. HARRIS, CLERK,
BY DEPUTY DENISE LOVELACE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

Civil Action No. S-84-116-CA

WILMA L. ARGUBRIGHT, Individually and as Next Friend of KURT ARGUBRIGHT, A Minor, and as Personal Representative of the Estate of JAMES LEWIS ARGUBRIGHT, Deceased; MARIE PAULE KERCKHOF, Individually and as Personal Representative of the Estate of PETER J. KERCKHOF, Deceased,
Plaintiffs,

v.

BEECH AIRCRAFT CORPORATION,
Defendant.

ORDER AMENDING JUDGMENT

Came on for consideration defendants' Motion for New Trial and/or Remittitur. Because of the nature of the relief sought in this motion, the Court shall treat it as one to alter or amend a judgment pursuant to Fed. R. Civ. P. 59(e). After careful consideration of the motion and the plaintiff's response thereto, it is the opinion of the Court that defendant's motion be granted to the extent specified herein.

The authorities cited by plaintiffs clearly support their entitlement to prejudgment interest. *Cavnar v. Quality Control Parking*, 696 S.W.2d 549 (Tex. 1985); *Matthews v. DeSoto*, 721 S.W.2d 286 (Tex. 1986); and *Wood v. Armco, Inc.*, 814 F.2d 214 (5th Cir. 1987). The Court also acknowledges the opinion of the Texas Supreme Court that once a plaintiff has established

an entitlement to prejudgment interest, a court lacks the discretion "to lessen or increase the interest amount for delays caused by either party." *Matthews*, 721 S.W.2d at 287.

These authorities, however, are inapplicable to the present situation. Moreover, the Court finds greater merit, and sees deeper equity, in the position of defendant. In *Cavnar*, the Texas Supreme Court created a system to fairly compensate plaintiffs, to provide disincentives for defendants to delay trial, and to encourage and expedite settlements. *Cavnar*, 696 S.W.2d at 554. To allow interest to accrue at an artificially high rate, during a period of time necessitated wholly by the Court, does not further the policies upon which the *Cavnar* court relied in creating its prejudgment interest rule. In addition, the rote application of an artificially high rate of interest as suggested by the Texas Supreme Court in *Cavnar* and *Matthews* would undermine equity and unreasonably penalize the defendant in this case.

It is therefore the opinion of the Court that justice will best be served by reforming the judgment previously entered herein to provide that: on all past due damages awarded to plaintiffs, interest shall accrue at the postjudgment rate, 6.93%, compounded according to 28 U.S.C. § 1961, from November 14, 1986, the date defendant filed its motion for judgment notwithstanding the verdict, until November 27, 1987, the date judgment was entered. All other aspects of the judgment shall remain unchanged, including the accrual of prejudgment interest at the rate directed by Art. 5069-1.05 during all periods preceding the date defendant's motion for judgment notwithstanding the verdict was filed.

IT IS SO ORDERED.

Signed this 22nd day of February, 1988.

/s/ Paul Brown
United States District Judge

FILED 4:20 PM 9-18 1986, MURRAY L. HARRIS, CLERK,
U.S. DISTRICT COURT, BY DONNIE HODGES, DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

Civil Action No. S-84-116-CA

WILMA L. ARGUBRIGHT, Individually and as Next Friend of KURT ARGUBRIGHT, A Minor, and as Personal Representative of the Estate of JAMES LEWIS ARGUBRIGHT, Deceased; MARIE PAULE KERCKHOF, Individually and as Personal Representative of the Estate of PETER J. KERCKHOF, Deceased,
Plaintiffs,

v.

BEECH AIRCRAFT CORPORATION,
Defendant.

VERDICT OF THE JURY

Your verdict will consist of the answers to the following questions:

Interrogatory No. 1

Do you find from a preponderance of the evidence that the Beech Musketeer aircraft was defectively designed in its seat adjustment and locking assembly?

We do not

(Answer: "We do" or "We do not")

If you have answered Interrogatory No. 1 "We do," then

answer Interrogatory No. 2, otherwise proceed to Interrogatory No. 3.

Interrogatory No. 2

Do you find from a preponderance of the evidence that such defective design was a producing cause of the deaths of James Lewis Argubright and Peter J. Kerckhof?

_____

(Answer: "We do" or "We do not")

Proceed to Interrogatory No. 3.

Interrogatory No. 3

Do you find from a preponderance of the evidence that prior to April 27, 1982, Beech Aircraft Corporation failed to adequately instruct as to seat adjustment and locking with respect to the "Beech Musketeer" aircraft?

We do

(Answer: "We do" or "We do not")

If you have answered Interrogatory No. 3 "We do," then answer Interrogatory No. 4, otherwise answer Interrogatory No. 6.

Interrogatory No. 4

Do you find from a preponderance of the evidence that such failure rendered the "Beech Musketeer" aircraft unreasonably dangerous as marketed?

We do

(Answer: "We do" or "We do not")

If you have answered Interrogatory No. 4 "We do," then answer Interrogatory No. 5, otherwise answer Interrogatory No. 6.

Interrogatory No. 5

Do you find from a preponderance of the evidence that such failure to instruct as to seat adjustment and locking was a producing cause of the deaths of James Lewis Argubright and Peter J. Kerckhof?

We do

(Answer: "We do" or "We do not")

Proceed to Interrogatory No. 6.

Interrogatory No. 6

Before proceeding to Interrogatory No. 6, you must have answered "We do" to either one or both of Interrogatories Nos. 2 and 5. Otherwise answer no further.

Do you find from a preponderance of the evidence that James Lewis Argubright's operation of the "Beech Musketeer" on the occasion in question was negligent?

We do

(Answer: "We do" or "We do not")

If you have answered Interrogatory No. 6 "We do," then answer Interrogatory No. 7, otherwise answer Interrogatory No. 8.

Interrogatory No. 7

Do you find from a preponderance of the evidence that James Lewis Argubright's negligent operation of the "Beech Musketeer" on the occasion in question was a proximate cause of the crash?

We do

(Answer: "We do" or "We do not")

Proceed to Interrogatory No. 8.

Interrogatory No. 8

Do you find from a preponderance of the evidence that Peter J. Kerckhof's instructions to James Lewis Argubright in the operation of the "Beech Musketeer" on the occasion in question were negligent?

We do not

(Answer: "We do" or "We do not")

If you have answered Interrogatory No. 8 "We do," then answer Interrogatory No. 9, otherwise proceed to Interrogatory No. 10.

Interrogatory No. 9

Do you find from a preponderance of the evidence that Peter J. Kerckhof's negligence on the occasion in question was a proximate cause of the crash?

We do not

(Answer: "We do" or "We do not")

Proceed to Interrogatory No. 10.

Interrogatory No. 10

If in answers to Interrogatories No. 2, 5, 7 and 9, you found that more than one party's act, omission, or product caused the occurrence, and only in that event, then answer Interrogatory No. 10.

In answering Interrogatory No. 10, you are instructed that the percentage of causation attributable to a party or product is not necessarily measured by the number of acts, omissions, or product defects found. The percentages you find must total 100 percent.

For each party or product found by you to have caused the occurrence, find the percentage caused by:

Beech Aircraft Corporation:		70%
Peter J. Kerckhof:		0%
James Lewis Argubright:		30%
	Total	100%

You must now answer each of the following Interrogatories numbered 11 through 29.

Interrogatory No. 11

Find from a preponderance of the evidence what sum of money, if paid now in cash, would fairly and reasonably compensate Wilma Argubright for her past pecuniary loss, resulting from the death of James Lewis Argubright.

Consider the following elements, and none other: care, maintenance, support, services, advice, counsel, and contributions of pecuniary value that Wilma Argubright would, in reasonable probability, have received in the past from James Lewis Argubright during his lifetime had helived.

Answer in dollars and cents.

Answer: $100,000.00

Interrogatory No. 12

Find from a preponderance of the evidence what sum of money, if paid now in cash, would fairly and reasonably compensate Wilma Argubright for her future pecuniary loss, resulting from the death of James Lewis Argubright.

Consider the following elements, and none other: care, maintenance, support, services, advice, counsel, and contributions of pecuniary value that Wilma Argubright would, in reasonable probability, have received in the future from James Lewis Argubright during his lifetime had he lived.

Answer in dollars and cents.

Answer: $200,000.00

Interrogatory No. 13

Find from a preponderance of the evidence what sum of money, if paid now in cash, would fairly and reasonably compensate Wilma Argubright for her loss of companionship and society in the past, resulting from the death of James Lewis Argubright.

Consider the following elements and none other: affection, solace, comfort, companionship, society, assistance and relations necessary to a successful marriage.

Answer in dollars and cents.

Answer: $ 0.00

Interrogatory No. 14

Find from a preponderance of the evidence what sum of money, if paid now in cash, would fairly and reasonably compensate Wilma Argubright for her loss of companionship and society in the future, resulting from the death of James Lewis Argubright.

Consider the following elements and none other: the right of Wilma Argubright to that affection, solace, comfort, companionship, society, assistance and relations necessary to a successful marriage.

Answer in dollars and cents.

Answer: $ 0.00

Interrogatory No. 15

Find from a preponderance of the evidence what sum of money, if paid now in cash, would fairly and reasonably com-

pensate Wilma Argubright for her mental anguish and grief in the past, resulting from the death of James Lewis Argubright.

Answer in dollars and cents.

Answer: $ 0.00

Interrogatory No. 16

Find from a preponderance of the evidence what sum of money, if paid now in cash, would fairly and reasonably compensate Wilma Argubright for her mental anguish and grief in the future, resulting from the death of James Lewis Argubright.

Answer in dollars and cents.

Answer: $ 0.00

Interrogatory No. 17

Find from a preponderance of the evidence what sum of money, if paid now in cash, would fairly and reasonably compensate Kurt Argubright for his past pecuniary loss, resulting from the death of James Lewis Argubright.

Consider the following elements, and none other: care, maintenance, support, services, advice, counsel, and contributions of pecuniary value that Kurt Argubright would, in reasonable probability, have received in the past from James Lewis Argubright during his lifetime had he lived.

Answer in dollars and cents.

Answer: $ 18,000.00

Interrogatory No. 18

Find from a preponderance of the evidence what sum of money, if paid now in cash, would fairly and reasonably com-

pensate Kurt Argubright for his future pecuniary loss, resulting from the death of James Lewis Argubright.

Consider the following elements, and none other: care, maintenance, support, services, advice, counsel, and contributions of pecuniary value that Kurt Argubright would, in reasonable probability, have received in the future from James Lewis Argubright during his lifetime had he lived.

Answer in dollars and cents.

Answer: $ 32,000.00

Interrogatory No. 19

Find from a preponderance of the evidence what sum of money, if paid now in cash, would fairly and reasonably compensate Kurt Argubright for his loss of companionship and society in the past, resulting from the death of James Lewis Argubright.

Consider the following elements and none other: love, companionship, and society that Kurt Argubright would, in reasonable probability, have received in the past from James Lewis Argubright if he had lived.

Answer in dollars and cents.

Answer: $ 0.00

Interrogatory No. 20

Find from a preponderance of the evidence what sum of money, if paid now in cash, would fairly and reasonably compensate Kurt Argubright for his loss of companionship and society in the future, resulting from the death of James Lewis Argubright.

Consider the following elements and none other: love, companionship, and society that Kurt Argubright would, in rea-

sonable probability, have received in the future from James Lewis Argubright if he had lived.

Answer in dollars and cents.

Answer: $ 0.00

Interrogatory No. 21

Find from a preponderance of the evidence what sum of money, if paid now in cash, would fairly and reasonably compensate Kurt Argubright for his mental anguish and grief in the past, resulting from the death of James Lewis Argubright.

Answer in dollars and cents.

Answer: $ 0.00

Interrogatory No. 22

Find from a preponderance of the evidence what sum of money, if paid now in cash, would fairly and reasonably compensate Kurt Argubright for his mental anguish and grief in the future, resulting from the death of James Lewis Argubright.

Answer in dollars and cents.

Answer: $ 0.00

Interrogatory No. 23

Find from a preponderance of the evidence what sum of money, if paid now in cash, would fairly and reasonably compensate Marie Paule Kerckhof for her past pecuniary loss, resulting from the death of Peter J. Kerckhof.

Consider the following elements, and none other: care, maintenance, support, services, advice, counsel, and contributions of pecuniary value that Marie Paule Kerckhof would,

in reasonable probability, have received in the past from Peter Kerckhof during his lifetime had he lived.

Answer in dollars and cents.

Answer: $ 75,000.00

Interrogatory No. 24

Find from a preponderance of the evidence what sum of money, if paid now in cash, would fairly and reasonably compensate Marie Paule Kerckhof for her future pecuniary loss, resulting from the death of Peter J. Kerckhof.

Consider the following elements, and none other: care, maintenance, support, services, advice, counsel, and contributions of pecuniary value that Marie Paule Kerckhof would, in reasonable probability, have received in the future from Peter J. Kerckhof during his lifetime had he lived.

Answer in dollars and cents.

Answer: $425,000.00

Interrogatory No. 25

Find from a preponderance of the evidence what sum of money, if paid now in cash, would fairly and reasonably compensate Marie Paule Kerckhof for her loss of companionship and society in the past, resulting from the death of Peter J. Kerckhof.

Consider the following elements and none other: the right of Marie Paula Kerckhof to that affection, solace, comfort, companionship, society, assistance and relations necessary to a successful marriage.

Answer in dollars and cents.

Answer: $ 0.00

Interrogatory No. 26

Find from a preponderance of the evidence what sum of money, if paid now in cash, would fairly and reasonably compensate Marie Paule Kerckhof for her loss of companionship and society in the future, resulting from the death of Peter J. Kerckhof.

Consider the following elements and none other: the right of Marie Paule Kerckhof to that affection, solace, comfort, companionship, society, assistance and relations necessary to a successful marriage.

Answer in dollars and cents.

Answer: $ 0.00

Interrogatory No. 27

Find from a preponderance of the evidence what sum of money, if paid now in cash, would fairly and reasonably compensate Marie Paule Kerckhof for her mental anguish and grief in the past, resulting from the death of Peter J. Kerckhof.

Answer in dollars and cents.

Answer: $ 0.00

Interrogatory No. 28

Find from a preponderance of the evidence what sum of money, if paid now in cash, would fairly and reasonably compensate Marie Paule Kerckhof for her mental anguish and grief in the future, resulting from the death of Peter J. Kerckhof.

Answer in dollars and cents.

Answer: $ 0.00

TESTIMONIAL EXCERPTS

(Vol. 3, pp. 22-23, 44-56)

MIKE H. McCLURE,

having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HOWIE:

Q. Well, Mr. McClure, we have got to start somewhere. I think we have got it all together, now.

Mr. McClure, would you mind telling the jury your full name, please?

A. It is Mike H. McClure.

Q. I am going to ask you to keep your voice up so everybody can hear your testimony, if you could.

You are here as the Beechcraft company representative, is that correct?

A. Yes, sir, that's correct.

* * *

Q. Now, you know from your experience at Beechcraft that in aviation safety is the number consideration, isn't it?

A. I would think so, yes, sir.

* * *

Q. Well, from your military experience – I misspoke myself and I apologize for that, but in your military flying experience that was true and is true at Beechcraft, isn't it?

A. Yes, it is.

Q. It is true in aviation?

A. Yes, sir.

Q. We know that the checklist is – you heard me make my opening statement here and I said a few things about the checklist. I want to get them into evidence now. The checklist is always used, isn't it?

A. It is recommended, yes, sir.

Q. Well, in fact, you use it every time you fly, don't you?
A. I believe I have. I certainly try to.
Q. It is very important, isn't it?
A. I think so, yes, sir.
Q. There are a number of different type checklists for airplanes, aren't there?
A. Yes, sir.

* * *

Q. You all prepare checklists?
A. Yes, sir.
Q. At Beechcraft?
A. Yes, sir.
Q. Preflight checklist, that is the checklist that tells you what to do before you ever get in the airplane?
A. That is correct.
Q. Step by step, and it even has a drawing in it, doesn't it?
A. Yes, it does.

* * *

Q. Now, Mr. McClure, even though you fly the same airplane every day all of your life, is it recommended that you memorize the checklists?
A. No, sir.
Q. You don't ever memorize a checklist, do you?
A. It is not recommended, but some people do.
Q. The checklists, we know, are the result of well-thought-out decisions about the minimum things that people need to do at each one of these phases of flight, is that right?
A. Yes, sir.
Q. The thing that we know is that they are just a minimum, is that right?
A. That is correct.
Q. I am going to list some more of them here in just a minute. They are the minimum things that need to be done and they are to be done on every flight, aren't they?
A. They are recommended, yes, sir.

Q. In a training situation it is even more important to use the checklists, isn't it?
A. Yes, sir, it is.
Q. Why is that?
A. Students tend to forget things more often than more experienced pilots. They all tend to commit certain things to memory, which they shouldn't. So, the checklist is very important for a student to follow.
Q. We know that students forget today and students forgot when I learned to fly and I'm sure they forgot when you learned to fly?
A. Yes, sir.
Q. And probably before that?
A. I would hope so.
Q. Checklists are used not only in Beechcraft products, but by everybody, aren't they, or everything that flies, anyway?
A. Yes, sir, as far as I know.
Q. They are not just used by students and instructors, are they?
A. No, sir.
Q. Fighter pilots use them?
A. Yes, sir.
Q. Commercial airline pilots, 747's and big jets use them?
A. Yes, sir.
Q. Corporate airplanes use them?
A. Yes, sir.
Q. Astronauts use them?
A. Yes, sir.

* * *

Q. Now, there is no question, is there, in your mind, sir, that the checklist that was on board this airplane when it crashed did not mention to tell the pilots to check their seats, did it?
A. I didn't see any checklist of any kind aboard this airplane.

Q. I will show you what has been marked as Plaintiff's Exhibit 26 and agreed upon. This is Exhibit 26 that was taken from the wreckage. This is the Beech Muskateer checklist, is it not, that was originally sold with the aircraft in 1968?

A. That looks like it.

* * *

Q. I will show you what has been marked as plaintiff's exhibit. I will show you – I don't have the number, but I will have it in just a minute. This is the checklist that is the current checklist, isn't it, sir?

A. It appears to be.

Q. Right up here on the before start checklist the first item is seats and the command to the pilot to properly position them and lock them, doesn't it?

A. Yes, sir.

Q. That is a good command, isn't it?

A. In my opinion, yes, sir.

Q. It is needed for safety to have them – I mean, it is essential for safety that you have your seat properly positioned and locked before you go flying, isn't it?

A. Yes, sir.

Q. Am I correct, sir, that a – was I correct when I told the jury that a seat slip on take-off is a very dangerous condition for a pilot?

A. In my opinion, yes, sir.

Q. Why is that?

A. Well, if you are moving your seat, you are obviously not manipulating the controls as well as you might be. It is important to handle the airplane before you try to do something else.

Q. Like in our car, if the seat slips, we hold onto the wheel and pull on the steering wheel a little bit, but if that happens in the airplane, what happens to the airplane?

A. If you pull on the control wheel, you're going to make the airplane go up.

Q. If the airplane goes up, as Mr. Cowles told the jury, and I believe it is correct, and you've probably determined this, that the airplane, if it goes up fast enough it will stall, is that correct?

A. That is correct.

Q. It doesn't mean the engine quits, does it?

A. No, sir.

Q. What does that mean?

A. The airplane stops flying.

Q. When the airplane stops flying, what does it do?

A. It generally turns around and come back down.

Q. Just like this one did?

A. Yes, sir.

Q. You do recognize there at Beechcraft that the manufacturer has a responsibility to provide safety-of-flight information?

A. Yes, sir.

Q. You don't rely upon the human memory, do you, because students forget?

A. We try not to.

Q. Safety-of-flight in the aviation industry is sometimes referred to as SOF, right, safety-of-flight?

A. I suppose it could be.

Q. Manufacturers provide safety-of-flight information, don't they?

A. Yes, sir.

Q. Or should anyhow, shouldn't they?

A. Yes, sir, we do.

Q. And the reason that we have checklists and manufacturers should provide safety-of-flight information is to prevent accidents, isn't it?

A. That is correct.

* * *

(Vol. 3, pp. 81, 154, 209-210)

DONALD A. KENNEDY,

having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HOWIE:

Q. Dr. Kennedy, would you mind – may I proceed, Your Honor?

THE COURT: You may.

Q. Would you mind telling the Court your full name, please?

A. Donald A. Kennedy

Q. I will try to move along real quickly. You are a professor at the University of Colorado, is that right?

A. That is correct.

Q. What school are you in, please?

A. I am in the College of Engineering and Applied Science.

Q. Are you a pilot?

A. Yes, I am.

Q. Have you flown the Beechcraft Muskateer?

A. Yes, I have.

* * *

Q. Doesn't every pilot know to check his seat?

A. No, I don't think so. If every pilot knew, then you wouldn't need to put it on the checklist.

Q. Well, is the need to latch the seat and properly position the seat something that in your opinion in 1968 should have been on the checklist?

A. Absolutely. It is a safety item. It ought to be on the checklist.

* * *

Q. Anyway, or at any rate, what you would do is go into a full explanation of what may happen to them if they don't position and lock their seat, right?

A. It wouldn't have to be a long, wordy thing, but something that would get their attention to be sure that they do pay attention and lock their seat.

Q. What about the other items in the checklists? Do you need to explain to the pilot on each one of them what may happen if he doesn't do it?

A. If it is something that is liable to kill him, sure.

* * *

Q. Don't you have to rely on a little common sense by the operators of these aircraft?

A. I think you have to rely a bit on common sense and judgment, but on safety issues I think you need – particularly for airplanes I think you need to be very pointed about it. You need to supply that in the checklist.

* * *

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OCT 5 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 89-286

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

WILMA L. ARGUBRIGHT, Individually and as Next Friend of KURT ARGUBRIGHT, a Minor, and as Personal Representative of the Estate of JAMES ARGUBRIGHT, Deceased, and MARIE PAULE KERCKHOF, Individually and as Personal Representatives of the Estate of PETER J. KERCKHOF, Deceased, *Petitioners*

v.

BEECH AIRCRAFT CORPORATION, *Respondent*

Brief in Opposition

COWLES & THOMPSON
MICHAEL W. HUDDLESTON
4000 NCNB Plaza
901 Main Street
Dallas, TX 75202
(214) 670-1100
Attorneys for Respondent

Fort Worth Brief Printing Co., 610 South Jennings Avenue, Fort Worth, Texas 76104 Phone 817-332-4070

36 pp

QUESTIONS PRESENTED

1. Whether the decision of the Court of Appeals for the Fifth Circuit, in this diversity case, properly determined the substantive tort law of the State of Texas?
2. Whether the decision of the Court of Appeals for the Fifth Circuit violates the Seventh Amendment of the United States Constitution?

LIST OF PARTIES

1. Wilma L. Argubright, Individually and as Next Friend of Kurt Argubright, a Minor, and as Personal Representative of the Estate of James Argubright, Deceased.
2. Kurt Argubright.
3. Marie Paule Kerckhof, Individually and as Personal Representative of the Estate of Peter J. Kerckhof, Deceased.
4. Counsel: Law Offices of Windle Turley, P.C.
   Dallas, Texas.
5. Beech Aircraft Corporation.[1]
6. Counsel: Cowles & Thompson, P.C.
   Dallas, Texas.

---

[1]Pursuant to Rule 28.1 of the rules of this Court, Respondent presents the following list of parent, subsidiary, and affiliated corporations: Raytheon Company – parent corporation of Beech Aircraft Corporation; Beech Acceptance Corporation, Inc. – subsidiary of Beech Aircraft Corporation; Beech Aerospace Services, Inc. – subsidiary of Beech Aircraft Corporation; Beech Holdings, Inc. – subsidiary of Beech Aircraft Corporation; Beechcraft East-Hanscom – subsidiary of Beech Aircraft Corporation; Beechcraft East, Inc. – subsidiary of Beech Aircraft Corporation; Beechcraft West-Fresno – subsidiary of Beech Aircraft Corporation; Beechcraft West-Hayward – subsidiary of Beech Aircraft Corporation; Beechcraft West-Ontario – subsidiary of Beech Aircraft Corporation; Beechcraft West-Van Nuys – subsidiary of Beech Aircraft Corporation; Hangar One, Inc. – subsidiary of Beech Aircraft Corporation; Hartzog Aviation, Inc. – subsidiary of Beech Aircraft Corporation; Hedrick Beechcraft-Houston – subsidiary of Beech Aircraft Corporation; Indiana Beechcraft, Inc. – subsidiary of Beech Aircraft Corporation; Target Missile Flight Service – subsidiary of Beech Aircraft Corporation, Inc.; Travel Air Insurance Company (Kansas) – subsidiary of Beech Aircraft Corporation; Travel Air Insurance Company, Ltd. – subsidiary of Beech Aircraft Corporation; and United Beechcraft, Inc. – subsidiary of Beech Aircraft Corporation.

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No. 89-286

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

WILMA L. ARGUBRIGHT, Individually and as Next Friend of KURT ARGUBRIGHT, a Minor, and as Personal Representative of the Estate of JAMES ARGUBRIGHT, Deceased, and MARIE PAULE KERCKHOF, Individually and as Personal Representatives of the Estate of PETER J. KERCKHOF, Deceased, *Petitioners*

v.

BEECH AIRCRAFT CORPORATION, *Respondent*

Brief in Opposition

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent Beech Aircraft Corporation respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Fifth Circuit's opinion, which is reported at 868 F.2d 764.

A. STATEMENT OF THE CASE

This diversity, personal injury case was presented to the Fifth Circuit on the basis that the district court erred in refusing to grant Respondent's Motion for JNOV. This

motion urged that there was no evidence to support the jury finding that Respondent had a duty to give an instruction to position and lock the aircraft seat. This is a case that turned upon the analysis of the particular facts presented to the jury. The discussion of the record presented in the Petition for Writ of Certiorari is incomplete and the evidence is discussed out of context.

1. History of the Aircraft:

In 1962, Beech began manufacturing a series of general aviation aircraft called the "Musketeer." (Tr. 25:11-13.) The plane included a unique seat-lock system that was different from any other general aviation aircraft. (Tr. 544:7-8.) Despite the fact that thousands of the Musketeer planes were in operation, there were no incidents of any kind relating to the positioning and locking of the seats. (Tr. 210:16-21; 405-406.) The aircraft operated safely using its original 1968 instruction manual and the seating mechanism in question. (*Id.*) There had been no claims, accidents, or allegations that the seating system and/or instructions were defective. (Tr. 406:5-11.)

The aircraft manufacturers that experienced problems with their seating systems had utilized seating systems that did not include a locking mechanism like the Beech aircraft. (Tr. 409:11-14.) The Musketeer seat system used a Teflon block instead of rollers, with a spring-loaded beveled or chamfered pin. (Tr. 125:20-21; 546-47.) Other general aviation manufacturers utilized rollers in the seat mechanisms. (Tr. 546.) Rollers present problems because they wear easily and there is more movement in the seat on the rail, thus creating a propensity for free-play and non-alignment. (Tr. 546:8-10.) The utilization of

the Teflon system assures proper alignment, and the beveling of the pin aids in the event of an actual misalignment. (Tr. 546-47.)

2. The 1968 Manual:

Because of the lack of any difficulties with the Musketeer seat system and because of the different manner in which it was designed, the original owner's manual (the 1968 manual) did not include a "position and lock" instruction. (Tr. 52:16-21; Exh. 26.) In 1979, the manual for the Musketeer was revised pursuant to a directive from the General Aviation Manufacturer's Association ("GAMA"). (Tr. 465:23-25.) The GAMA sought to standardize the manuals of various manufacturers so that a pilot could easily and safely switch from one brand of plane to another. (Tr. 406-407.) Some manufacturers, as noted above, had experienced seat system problems, and, thus, the "position and lock" command was included in the GAMA revised manual for standardization purposes even though Beech had experienced no problems with its seating system. (Tr. 467:9-17; 466:8-15; 465:23-25.)

3. Notice of Manual Change:

Notice of the revised manual was sent in a letter form to all individuals and entities on the "Owner Notification List" maintained by the FAA. (Tr. 397:8-17.) This is a list with the names and addresses of all registered aircraft owners. (Tr. 397:8-17; 400:7-11; Exh. 38.) Beech and other manufacturers use this list as a standard procedural method for mailing letters notifying owners that the manual has been revised. (Tr. 410-12; 400:7-11; 201:11-20.)

A notice letter was sent by Beech to a Mr. Brian Jordan, the then owner of the aircraft involved in the extant case. (Tr. 401:8-22; Exh. 39.) A short time later, a copy of the 1979 revised manual was sent to all current Musketeer owners, including Brian Jordan. (Tr. 401:6-7; 402:2-5.) A record was kept by Beech as to the letters that were sent out. (Tr. 400:22-25 to 401:1.) The District Court correctly instructed the jury to presume that the registered owner at the time of issuance received the 1979 manual. (Tr. 691:7-11.)

The letter to the registered owner referred to the outdated manual and stated: "It is essential that you familiarize yourself with the material contained in the revised handbook and keep this handbook with the airplane at all times." (D. Exh. 38; Tr. 410-12.) The letter further stated that it considered the revised manual to be the official document and that it had notified the FAA of its position. (Tr. 412:12-15.) The letter emphasized that the pilot is required to operate the aircraft in accordance with FAA approved data. (Tr. 412:19-21.)

Not only did the registered owner of the Musketeer in this case get a copy, but also one of the subsequent purchasers, Greg Young, received the revised manual. An "update card" from the 1979 manual, with the original owner's name typed on it, was actually sent to Beech sometime in September 1981. (Tr. 402:22-25 to 403:18-19.) The card listed the new owner, Greg Young. (Exh. 40.) There is no way the original owner (Bryan Jordon) and the subsequent purchaser (Greg Young) could have obtained the "update card" unless Jordan had actually received the revised manual and still possessed it at the time when the plane was sold. (Tr. 403-404.)

Young was one of the joint owners of the plane, along with Argubright, prior to the accident. (Tr. 404:9-11.)

4. Obligation of Owner and Pilot to Insure Current Manual:

It is the obligation of the owner and/or operators of aircraft to make sure the current manual is in the airplane. (Tr. 404:12-17; 435:2-3.) Beech tells pilots and owners how to keep their manuals up to date. (Tr. 440:11-12.) This is a responsibility imposed by law on pilots and owners. (Tr. 204-207; 440:15-20.) Section 91.31(b)(1) of Title 42 of the Code of Federal Regulations provides that no person may operate a U.S. registered civil aircraft "unless there is available in the aircraft a *current approved* Airplane . . . Flight Manual. . . ." (Emphasis added.)

Every pilot is under a duty to familiarize himself or herself with all available current information concerning that flight before beginning the flight. 42 C.F.R. § 91.5 (1979). Section 91.3 provides that the pilot in command has direct responsibility and is the final authority with respect to the operation of the aircraft. Plaintiffs' expert and numerous other witnesses testified that it is the duty of the pilot in command to find out if there is a more current manual and to obtain one. (Tr. 207:1-3; 504:3-8 to 506:1-20; 512:3-10.)

Current manuals are easy to obtain. (Tr. 395:3-7.) Beech issued a service instruction that included a list of all manuals currently published for Beech airplanes. (Tr. 395:8-17; D. Exh. 41.) This instruction gives all necessary pertinent information on current manuals. (Tr. 395:18-21.) The instruction is available at Beech

dealers, airports and FBO's and other such locations. (Tr. 395:22-24.) Plaintiffs' expert admitted that the manuals of the various general aviation aircraft manufacturers are readily available. (Tr. 85:19-25 to 86:1-3.)

5. The Accident:

On April 27, 1982, James L. Argubright and Peter J. Kerckhof, his flight instructor, were operating a Musketeer model B-23 at the Aero Valley Airport, near Roanoke, Texas. (Tr. 228:1-4.) They had safely taken off and landed a number of times earlier in the day. (Tr. 292:8-9.) At approximately 2:50 p.m., the airplane, after climbing on take-off approximately 100 feet above the ground, stalled, rotated, went into a spin and crashed. (Tr. 229:11-12; 235:14-22.)

6. Alternative Theories of Accident:

Petitioners state that it was "undisputed that the crash occurred because the Beech seat in which Argubright was sitting was not latched, and slipped back during take-off." (Petition at 3.) In fact, there were two theories as to how the accident occurred: (1) the seat was not positioned and locked prior to take-off, and (2) the seat was adjusted during the course of take-off. Petitioners' theory that the instructions were inadequate was based on the testimony of their expert, Donald Kennedy. This theory assumed that the seating system was defectively designed in that it was difficult to detect that the seat was unlatched. (Tr. 152:15-20; 153:7-10.) Plaintiffs' presented no evidence that there would be a duty to instruct to "position and lock" if there was in fact no defect in the

seating system. Moreover, Petitioners failed to establish a duty to instruct pilots not to adjust their seats in flight.

The jury concluded that the plane was in fact not defectively designed and thus it was not difficult to detect that the seat was not locked. (Tr. 195.) This fact, and the evidence of the physical operation of the plane, established that this case involved an in-flight seat adjustment. The evidence was clear that there would be no duty to warn a pilot not to adjust and lock his seat while in the course of taking off. (Tr. 195:23-25 – 196:1-4.) Petitioners' expert conceded that there was no physical evidence to indicate that an in-flight adjustment was not attempted. (Tr. 199:21-25.) He also conceded that the markings on the seat rail were equally consistent with both the Petitioners' and the Respondent's theories. (Tr. 200:2-8.) Finally, Petitioners' expert stated that he did not think "anybody has any physical evidence that it was one scenario or the other." (Tr. 200:9-13.)

7. Operation of Aircraft:

The testimony at trial revealed that it was not possible for the aircraft seat to have been unlocked and not moved fore and aft as the pre-flight checks and tests were conducted. Thus, the pilot and passenger would be immediately made aware of the fact the seat was unlocked by its physical movement. Mike McClure testified:

> There [are] all kinds of movement that he would . . . absolutely have to do before he ever got to the runway and took off. During that time I feel that the seat would have moved if he had started with it on top of the rail and the pin would have dropped in a hole. I find it totally absolutely unfathomable that he

> took off in the airplane with that pin riding on that rail.

(Tr. 388-89.) The pilot's movements prior to take-off include: (1) pushing and working the rudder pedals, (2) pulling and pushing on the yoke, and (3) applying the brakes. (Tr. 389-91.) Moreover, going down the runway is not gentle; there is a lot of movement because of bouncing and bumping of the plane on the runway. (Tr. 391-92.) Three other expert witnesses testified that the preflight maneuvers are such that it was physically impossible for Argubright to have left his seat unlocked *prior* to takeoff without noticing it was unlocked. (Tr. 468-73; 503; 551-55.)

B. REASONS FOR DENYING THE WRIT

1. The Issues are Not Important:

Neither the factual nor legal issues presented by the petition merit the granting of a writ of certiorari in this case. This is a diversity case in which the Fifth Circuit was called upon to determine the applicable Texas law and to apply that law to the facts before it. It did this. Petitioners disagree with the result and that is the sole basis for their Petition for Writ of Certiorari.

Contrary to Petitioners' assertions, the Fifth Circuit has not "exempted" an industry from following important safety factors nor has it eliminated the need for warnings recommended by the GAMA. In fact, the GAMA recommendations were incorporated in the Musketeer instruction manual and were in fact provided to one of the co-owners of the aircraft with Mr. Argubright. Moreover, the record establishes that the warning to

position and lock was not one that was needed with respect to the aircraft involved in this case. While some manufacturers have had problems with a true defect involving a true design and manufacturing defect involving seat slippage, the Musketeer aircraft involved in the present case has never experienced any such problems, and, thus, there was no need to warn of this in the aircraft in question. One opinion dealing with the one accident in the approximately twenty-five years of safe operation of Musketeers is simply not going to set a long-standing precedent applicable to numerous future cases.

The opinion issued by the court of appeals speaks solely to the facts before it. It sets no special broad standard or rule of law that is to be blindly applied to every manufacturer. If the issues were as significant as Petitioners suggest, then this Court must ask why no attempt was made to have the legal questions certified to the Texas Supreme Court pursuant to Tex. R. App. P. 114. This Court is being asked to do that which Petitioners could have had the Texas Supreme Court do. Petitioners cannot show a societal or legal concern sufficient to justify further review of the facts and the law in this case.

2. Alternative Bases Support the Fifth Circuit's Decision:

Respondent asserted multiple, alternative bases for the reversal of the judgment below. The Fifth Circuit addressed only one of these bases, holding that the "jury could not have reasonably determined that Beech should reasonably have anticipated that student pilots would position their seat but fail to lock it prior to takeoff." The

additional bases are as follows: (1) Beech had no duty to instruct because there was no evidence of a "seat slippage" problem with this particular type of aircraft or that Beech had knowledge of an unreasonable risk of harm as to the seat system; (2) the accident was the result of an in-flight seat adjustment, and because such action would be (in the words of Petitioners' expert) "irrational" and violative of "common sense," Beech had no duty to instruct as to in-flight adjustment; and (3) the inclusion of the "position and lock" instruction in the 1979 revised manual satisfied any duty Beech may have had. Thus, in addition to the fact-sensitive points already presented by Petitioners, the alternative bases will have to be addressed and the evidence in connection with those issues reviewed if writ is granted in this case.

3. The Decision Complies with *Erie* and Correctly States Texas Law:

Petitioners urge that the Fifth Circuit failed to follow *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and that the court supposedly misstated Texas law with respect to when there is a duty to warn. The federal courts in diversity cases are "bound to construe Texas law in the same way that its courts would if confronted with the same issues. . . ." *In re: Air Crash at Dallas/Fort Worth Airport*, 856 F.2d 28, 30 (5th Cir. 1988). In diversity cases where state law is silent on the issue presented or where "pinpoint" state law is absent, federal courts, sitting as a state trial judge, must endeavor to apply law which [it] believes the state's highest court would declare if it had the opportunity to do so in the case at hand." *Crutinger v. Hess*, 408 F.Supp. 548, 554

(D. Kan. 1976). That is precisely what the Fifth Circuit did in the present case.

a. The Nature of the Court's Decision:

The Fifth Circuit held that "[p]roduct liability doctrine governing the manufacturer's duty to warn is well settled in Texas." 868 F.2d at 766. The court further stated that "there is no duty to warn of dangers obvious to the user of the product." *Id.* The court concluded that the question of whether there is a duty to warn and the adequacy of the warnings given "must be evaluated in connection with the knowledge and expertise of those who may reasonably be expected to use or otherwise come in contact with the product as it proceeds along its intended marketing chain." *Id.* These statements of "well-settled" Texas law are entirely correct.

b. Comparative Causation – False Conflict:

Petitioners erroneously assert that the holding of the Fifth Circuit involved some type of "no duty" concept that has been eradicated by the adoption of comparative causation. (Petition at 7.) Under Petitioners' interpretation of the law, there would be no need to ask liability issues dealing with the duty to instruct or the adequacy of the instructions because the jury's only task under the Petitioners' interpretation of Texas law is to compare the conduct of the various actors and determine the applicable percentages of causation. (Petition at 7.)

Petitioners have obviously attempted to fashion a "false conflict" between the decision of the Fifth Circuit in this case and that of the Texas Supreme Court in *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 428-38 (Tex.

1984). The decision in *Duncan* does not address the issues involved in the present case. It certainly does not abolish the need to establish liability as a predicate to comparison. It cannot be seriously argued that this absurd notion is one the Texas Supreme Court would be likely to follow.

c. Numerous Decisions Applying Texas Law Are In Accord:

The decision of the Fifth Circuit in the present case, as well as those decisions cited in the opinion, correctly reflects Texas law. In *Middleton v. Harris Press & Shear, Inc.*, 796 F.2d 747, 751 (5th Cir. 1986), the court stated:

> Whether there is a duty to warn and the adequacy of a warning given must be evaluated in connection with "the knowledge and expertise of those who may reasonably be expected to use or otherwise come in contact with the product as it proceeds along its intended marketing chain."

Id. (citing *Martinez v. Dixie Carriers, Inc.*, 529 F.2d 457, 465-66 (5th Cir. 1976)). *See Koonce v. Quaker Safety Products & Mfg.*, 798 F.2d 700, 716 (5th Cir. 1986) (noting this rule was supported by *Ragsdale Bros., Inc. v. Magro, rev'd o.g.*, 721 S.W.2d 832 (Tex. 1986)).

In a diversity case, the court is bound to adhere to decisions of the state intermediate appellate courts absent some persuasive indication that the state's highest court would decide the issue otherwise. *Peoples Bank v. Polk County v. Roberts*, 779 F.2d 1544, 1545 (11th Cir. 1986). The rule of law stated in the prior Fifth Circuit decisions cited by that court in its opinion in the

present case was adopted by the Texas court of appeals in *Pearson v. Hevi-Duty Elec.*, 618 S.W.2d 784, 787 (Tex. Civ. App. – Houston [1st Dist.] 1981, writ ref'd n.r.e.), wherein the court stated: "The adequacy of a warning cannot be evaluated apart from the knowledge and expertise of those who may reasonably be expected to use the product." *Id.* (citing *Martinez, supra*; *Helene Curtis Indust. v. Pruitt*, 385 F.2d 84 (5th Cir. 1967), *cert denied*, 391 U.S. 913 (1968).) The same rule was followed by another Texas court of appeals in *Lopez v. Aro Corp.*, 584 S.W.2d 333, 336 (Tex. Civ. App. – San Antonio 1979, writ ref'd n.r.e.). Finally, even one of the leading commentators on Texas products liability law agrees that the Fifth Circuit has correctly stated the law in Texas. Sales, *Product Liability Law in Texas*, 630-31 (1984).

d. *Magro* in Accord.

Contrary to Petitioners' suggestion, the decision in *Magro v. Ragsdale Bros., Inc.*, 721 S.W.2d 832, 836 (Tex. 1986), has simply nothing to do with the issues in the present case. The court merely held that it was not an abuse of discretion for the trial court to refuse an "expert user" instruction. *Id.* The court's limiting of available jury instructions was part of the court's efforts to avoid the charge from being used as a repository for legally correct statements of the law that tend to indirectly relate to the specific questions posed to the jury. *Id. See First Int'l Bank v. Roper Corp.*, 686 S.W.2d 602, 604 (Tex. 1985).

The court of appeals in *Ragsdale Bros., Inc. v. Magro*, 693 S.W.2d 530, 536 (Tex. App. – San Antonio 1985), *rev'd o.g.*, 721 S.W.2d 832 (Tex. 1986), recognized, as did the court in this case, that "generally no duty to warn exists

when the danger or the potentiality of danger is obvious or actually known to the injured person." The later statements of the court about use with knowledge of the danger being subsumed within assumption of the risk are related solely to the facts of that case. In that case there was extensive evidence that warnings should have been given that would have prevented the accident. 721 S.W.2d at 833. The plaintiff therein testified that in his training he had never in fact received such instructions. *Id.* This is simply not the record presented here. Not surprisingly, the discussion of the lower court in *Magro* was in no way adopted or approved by the Texas Supreme Court's opinion in that case.

e. Rule of *Parker* Does Not Negate Need to Prove Duty To Warn:

Petitioners' attempt to place this case in the "no duty" line of cases, such as *Parker v. Highland Park, Inc.*, 565 S.W.2d 512 (1978) (rejecting the "open and obvious" defense in the premises negligence cases), is unpersuasive. Petitioners ignore the fact that their own evidence had to establish a legal duty to instruct and that the instructions given were inadequate. In *Bryant v. Gulf Oil Corp.*, 694 S.W.2d 443, 446 (Tex. App. – Amarillo, 1985 no writ), the court explained:

> It is axiomatic that in order to establish tort liability on the part of a defendant, a plaintiff must prove the existence and violation of a legal duty owed him by that defendant . . . That basic concept was not changed by the court's decision in *Parker* . . . Prior to *Parker*, a plaintiff was not only required to establish a duty owed and violation of that duty by a defendant but he must additionally "prove the

> absence of his own subjective knowledge and appreciation of any danger," *i.e.*, to negate "no duty." The *Parker* court abolished the additional requirement but did not change the underlying obligation to establish a duty on the party of the defendant and a violation of that duty.

Id. Accord Herring v. Hathcock, 643 S.W.2d 235, 237 (Tex. App. – El Paso 1982, writ ref'd n.r.e.).

The Fifth Circuit Court of Appeals adopted the same approach in *Middleton*, one of the cases cited in support of its decision in the present case. In *Middleton*, the same "no duty" argument was made. The court, discussing later Texas Supreme Court authority, stated:

> The no-duty rule was characterized by the Texas Supreme Court in *Dixon* [*v. Van, Waters & Rogers*, 682 S.W.2d 533 (Tex. 1984)] as an "oddity" that placed the burden on the plaintiff to "negate his own knowledge and his own appreciation of a danger." 682 S.W.2d at 533. However, the abolition of this rule did not effect the substantive standards governing the existence of a duty to warn. As stated in *Dixon*, "[a] plaintiff [no longer has] the burden to prove and obtain findings that he lacks knowledge and appreciation of a danger; he must, however, prove the defendant had a duty and breached it." 682 S.W.2d at 534.

796 F.2d at 751. The court concluded that the determination of whether there is in fact a duty to warn in the first instance and whether the warnings were adequate must be evaluated in connection with the knowledge and expertise of the persons reasonably expected to use and come in contact with the product. *Id.*

f. Arguments Not Timely and Properly Raised Below:

The Petitioners present legal arguments were expressly articulated for the first time on rehearing. They were not raised in response briefs in the trial court or in the principal briefs to the court of appeals. Further, Petitioners never asked the Fifth Circuit to certify this issue to the Texas Supreme Court. Tex. R. App. P. 114. Petitioners did not even suggest the case should be reheard en banc, which was the only way the prior decisions of other panels could have been rejected by the panel in this case. Fed. R. App. P. 35(a). It cannot be said that the panel of the Fifth Circuit erred in following its prior decisions when procedurally Petitioners gave it no option but to follow those decisions. *Davis v. Estelle*, 529 F.2d 437, 441 (5th Cir. 1976) (holding that "[o]ne panel . . . cannot disregard the precedent set by a prior panel, even though it conceives error in the precedent" absent en banc consideration).

g. Knowledge of User Must be Considered:

Petitioners contend that the expertise and knowledge of the user of the product cannot be looked at when the user is a "beginner." (Petition at 9.) This argument is completely contrary to well-established products liability law in Texas. In fact, it is contradicted by the very authorities cited by Petitioners. *Pearson*, 618 S.W.2d at 787.

Under Texas law, it is incumbent upon the plaintiff to establish that the manufacturer could anticipate that the product would become unreasonably dangerous if the

consumer or user is not warned or instructed in connection with the danger. *Id.* at 788. Obviously, the knowledge or expertise of the user, whether he is a beginner or a true expert, must be examined in determining if this test is met. It must also be examined in determining the adequacy of the instructions that are given. *Id.* at 787. In other words, given the state of knowledge of a pilot in the position of Mr. Argubright, the instructions given in the 1968 manual, which it did not include an instruction to "position and lock," were adequate.

The decision of the Fifth Circuit in *Pavlides v. Galveston Yacht Basin, Inc.*, 727 F.2d 330, 338-39 (5th Cir. 1984), is instructive of the error in Petitioners' arguments. The court in that case noted the fact that the adequacy of a warning must be evaluated in light of the knowledge of the ultimate users of the product. *Id.* at 338. Thus, where the product is marketed to professionals or experts, the manufacturer is entitled to "rely on the knowledge which a reasonable professional would apply in using the product." *Id.* The court further stated that when the product is manufactured to the general public, "the manufacturer must tender the warning to the man-in-the-street . . . ." *Id.* at 338-39. The court recognized that under both the circumstances of an expert user and a non-expert user, the knowledge of the user is to be examined *Id.*

The court in the present case expressly held that the danger associated with failing to position and lock the seat was something that was "obvious to pilots, even to novice pilots acting under the direction of a flight instructor." 868 F.2d at 767. Thus, the court tailored its holding to the specific type of user before it. The same was not

done by the trial court in *Pavlides*, and the Fifth Circuit Court of Appeals in that case appropriately reversed the holding of the trial court. *Id.* at 339.

Two other decisions cited by Petitioners do nothing to support their arguments. In *Lopez v. Aro Corp.*, 584 S.W.2d 333, 336 (Tex. Civ. App. – San Antonio 1979, writ ref'd n.r.e.), the court of appeals once again recognized the very rule that Petitioners claim is not the rule in Texas: the adequacy of a manufacturer's warning must be evaluated in light of the knowledge or expertise of those who could reasonably be expected to use the product. *Id.* at 336. The case in no way limits this evaluation to situations where the user is an expert. The decision in *Hamilton v. Motor Coach Indust., Inc.*, 569 S.W.2d 561 (Tex. Civ. App. – Texarkana 1978, no writ), has even less to do with the present case. There was no direct discussion of the issues presented as to the scope of knowledge or expertise that can be evaluated.

h. Petitioners' Arguments Defy the Logic and Policy of Products Liability Law:

There are distinct and important policy reasons behind the rule that the knowledge and experience of the user must be analyzed in determining if there is a duty to warn and whether the warning or instructions are adequate. If the law required manufacturers to instruct all users, even those possessing knowledge of the danger of a product, of all obvious dangers inherent in a product, "the list of foolish practices warned against would be so long, it would fill a volume." *Kerr v. Koemm*, 557 F.Supp. 283, 288 n.2 (S.D. NY. 1983). Indeed, the courts have recognized that it would be "totally unreasonable" to

require manufacturers to warn or protect against every injury that might result from the use of their products. *Borowicz v. Chicago Mastic Co.*, 367 F.2d 751, 760 (7th Cir. 1966). The rule of law suggested by Petitioners ignores these policies. Under Petitioners' interpretation, a manufacturer of knives would have to warn of their sharpness and a manufacturer of alcoholic beverages would have to warn of the products' intoxicating propensities. This is not a rule that Petitioners' can seriously urge would be adopted by the Texas Supreme Court.

i. Argubright Was Not a Mere Child:

The Fifth Circuit made clear that "the danger of an unlocked seat [that] could slide back, making it difficult or impossible to operate safely, or even to reach, those controls, is open and obvious to any reasonable driver." 868 F.2d at 767. Mr. Argubright was hardly the equivalent of a child learning to drive, as is suggested by Petitioners. The record reveals that Argubright started flying at age 15 and received a license at age 16. (Tr. 309; 314:16-18; 347:11-14.) He flew on and off for a number of years. (Tr. 314:19-20.) He even took additional flight training for several months in 1970. (Tr 347:20-22.) Argubright took ground school with his son in 1982. (Tr. 315:8-11.) He had begun to take flying lessons again prior to this accident. (Tr. 315:14-23.)

Petitioners make no mention of the fact that Argubright, as a part owner in the aircraft in question (Tr. 348:15-21), had a duty under FAA regulations to maintain a current manual. Indeed, as the Fifth Circuit correctly recognized, the flight manual available at the time of the accident, which was provided to one of his co-

owners, clearly included the very instruction that Petitioners claim was required. Regulations having the force of law make it a pilot's duty, before commencing a flight, to familiarize himself with all available information concerning the flight. *Brooks v. United States*, 695 F.2d 984, 990 (5th Cir. 1983); *Crossman v. United States*, 378 F.Supp. 1312, 1318 (D. Or. 1974).

j. Fifth Circuit Properly Determined Texas Law:

The *Erie* determination made by the Fifth Circuit was supported by Fifth Circuit case authority that has been cited by the Texas courts as authoritative under Texas law. *Pearson, supra; Lopez, supra.* Moreover, the decision of the court is consistent with the majority rule in other jurisdictions. *See, e.g., Jacobsen v. Colorado Fuel & Iron Corp.*, 409 F.2d 1263 (9th Cir. 1969) (no duty to warn that cable might snap in a tightening device); *Hopkins v. Ei DuPont de Nemours & Co.*, 212 F.2d 623 (3rd Cir. 1954) (dynamite manufacturer had no duty to warn of danger of premature explosion of dynamite placed in newly drilled hole before allowing heat caused by drilling to escape); *Dowdy v. Santa Fe Marine, Inc.*, 698 F.2d 232 (5th Cir. 1983) (operator of lifeboat was familiar with danger of prematurely pulling release lever); *Posey v. Clark Equip. Co.*, 409 F.2d 560 (7th Cir.), *cert denied*, 396 U.S. 940 (1969) (manufacturer of forklift truck designed without overhead guard had no duty to warn of dangers posed by falling objects as danger was generally owned and appreciated and is obvious to anyone, particularly forklift's operator).

4. The Decision Complies with the Seventh Amendment:

Petitioners assert that the Fifth Circuit's analysis of the evidence violated their Seventh Amendment rights. Petitioners do not specifically point out any aspect of the opinion that violates the applicable standard of review. Furthermore, the discussion of the evidence presented by Petitioners is incomplete and out of context.

a. Compliance with Standard of Review:

Petitioners suggest that appellate review of the sufficiency of the evidence to support the verdict is simply never available. To the contrary, the courts are clearly allowed to re-examine the evidence according to the rules of the common law to determine whether there was any competent and substantial evidence in the record which fairly tends to support the verdict. *Mortensen v. United States*, 322 U.S. 369, 374 (1963); *Wood v. Diamond M. Drilling Co.*, 691 F.2d 1165, 1168 (5th Cir. 1982). "The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury." *Tennant v. Peoria & P.U. Ry. Co.*, 321 U.S. 29, 35 (1944). "A verdict cannot stand without an evidentiary basis, and a verdict entered absent sufficient evidence . . . poses an error of law reversible under common law without a constitutional dilemma." 1 Childress, *Standards of Review*, § 3.1, at 154 (1986).

The Fifth Circuit correctly concluded that reasonable minds could not differ that an individual with Argubright's knowledge and experience had to know, without the need for further instruction, that the seat had to be

positioned and locked prior to take-off. *See Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th cir. 1969) (en banc). This issue of the duty to instruct was thus a question of law based on the evidence presented.

b. Petitioners' Review of Evidence Ignores Likelihood:

The fundamental misconception in Petitioners' analysis of the evidence is that in determining whether there was a duty to instruct, they look only to the Respondent's possible knowledge of a particular danger. Petitioners entirely disregard the undisputed evidence that there was no likelihood of the danger resulting in an accident. While the danger or harm that could result in the failure to "position and lock" prior to take-off is "obvious," it was not a risk of harm that was so likely or probable to occur from the standpoint of the manufacturer as to permit the imposition of a duty to instruct. There are any number of obvious dangers involved with the operation of an airplane, but where they are not likely to occur and they are not reasonably foreseeable, there is no duty to instruct. A manufacturer need not instruct as to every danger; it need only instruct or warn if it has knowledge of an *unreasonable risk* of harm.

c. No "Seat Slippage":

Petitioners' misconception is made evident by their reference to the testimony of Mike McClure. (*See* petition at 12-13.) McClure testified:

> Q. But we know that it is foreseeable that seat slippage can occur in a moveable seat?
> A. Maybe you know that but I don't know that.

(Tr. 420-21.) Petitioners incorrectly assert that this testimony proves that the danger of seat slippage was not something that was known to the average user of the aircraft.

First, the question asks if seat slippage was foreseeable by the manufacturer. The testimony in no way suggests that the failure to position and lock the seat was not an obvious danger from the perspective of the user of the aircraft. Second, the fact that a manufacturer has never experienced any problems with "seat slippage" in its seats and has never had any problems with pilots failing to adjust their seats (and not recognizing it prior to takeoff) or attempting to adjust their seats in flight is further evidence that pilots do in fact know how to operate the seat systems in the plane safely. Third, the testimony deals with "seat slippage," which is a defect in connection with the manner in which the seat is designed or manufactured; in other words, the seat is prone to involuntarily slip. There was no evidence in this case, and the jury accordingly found, that there was no defective design with respect to the seat system.

Interestingly, the portion of the record cited as supporting the proposition that not every pilot knows to check and lock his seat is decidedly inconclusive, speculative, and internally inconsistent. (Tr. 154.) This testimony does not deal objectively with what a pilot such as Mr. Argubright *should have known*. It does not consider his duty to have a current manual. It does not consider that the manual was properly sent in this case. Moreover, this testimony was based on the assumption that there was a defective design in the seating system that would make it difficult to detect if the seat was

unlatched; thus, if a pilot failed to latch the seat prior to take-off, he would not be able to determine it until the plane was ascending. This was the linchpin of the testimony of the very expert witness in question. (Tr. 152:15-27; 153:7-10.) Interestingly, an additional reference made by Petitioners to the record reveals that the danger perceived by Petitioners' expert was involved with other aircraft that used a roller seating system, which was entirely different from that used in the Musketeer aircraft. (Tr. 210:12-15.) Furthermore, the expert also testified on this same page of the record that he had in fact sought to determine if there had been prior accidents involving the Musketeer seat system; he had to admit that he had completely failed to find any prior allegations or accidents. (Tr. 210-11.)

5. The Fifth Circuit Made No Material Misstatement of the Facts:

The Petitioners recite five alleged "factual misstatements" in the Fifth Circuit's opinion. These complaints amount to nothing more than quibbling with statements that were not material to the resolution of the case below. Certainly, they do not amount to a justification for this honorable Court having to spend its valuable time re-reviewing the no evidence and substantive Texas tort law points presented in this case.

First, the Fifth Circuit stated that the jury found that the seat mechanism was not defectively designed. There is no question that the jury rejected the Petitioners' design defect theory. The jury cannot be said to have rejected the seat-slippage defect theory in one question and then used that rejected theory as the alleged known,

unreasonable risk of harm serving as the basis for a duty to instruct in answering the failure to instruct question.

The jury was imminently correct in rejecting the slippage theory. There was no evidence presented at trial that would support a finding of defective design. The existence of a design defect was an essential element of the duty to instruct sought to be imposed by Petitioners' expert. Thus, absent evidence of a defective design, there was no duty to instruct. The semantic complaint made by Petitioners is of no legal significance.

It is true that the basis of liability in this case was a strict liability theory based on failure to instruct. Under Texas law, negligent failure to instruct and failure to instruct on a strict liability basis are difficult, if not impossible, to differentiate. Certainly, there is no difference in the elements that are the subject of the Fifth Circuit's finding that there was no duty to instruct in this case. Indeed, Petitioners do not point to any difference.

The Fifth Circuit noted the fact that the jury found that Beech failed to "instruct as to the pre-flight checklist . . . ." This was in fact the theory of Petitioners' case. Petitioners did urge that placards and other devices could have been used to provide the instruction as a rejoinder to Respondent's argument that the provision of the revised manual, which included the position of the lock instruction, was sufficient to satisfy any duty it had. There was in fact no substantial evidence that these methods of providing revisions to the manual were any more precise than that actually used. Indeed, the evidence showed that they were less likely to provide the needed instruction than the actual method used. In any

event, the fact that the "failure to instruct" was "generic" is a distinction without a difference.

With respect to the comparative findings, the Fifth Circuit stated that the jury "assessed 30% comparative negligence against Argubright alone . . . ." It is true that the issue submitted to the jury was a "comparative causation" issue; it is equally true that the basis for comparison between Argubright and Beech involved Argubright's negligence and Beech's strict liability. Again, this semantic distinction is of no factual or legal significance in the present case.

The most glaring error in Petitioners' discussion of the Fifth Circuit's opinion is in connection with the Fifth Circuit's statement that the revised checklist "was sent to and received by owners of the aircraft involved in Argubright's crash." Petitioners urge that this statement is incorrect. In fact, the record revealed that the manual was sent to and received by the owner of the plane at the time of the update, and that in fact the manual made its way into the hands of two subsequent owners of the aircraft, Charles Thomas, and Greg Young in September of 1981. (Tr. 403-404.) The jury was even instructed that it was to be presumed that the registered owner of the aircraft "at the time the 1979 revised operator manual was issued, received the 1979 revised operator manual from Beech." (Tr. 691:7-11.) The evidence further established that an update card from the back of the 1979 revised manual was sent to Beech and that it was signed by George Young, one of the joint owners of the plane with Mr. Argubright prior to the time of the accident. (Tr. 404:9-11.) Thus, Petitioners' assertion that a *previ-*

ous owner received the manual, not one of the present owners, is simply incorrect.

Petitioners also urge that the Fifth Circuit was incorrect in that it did not note that the revised checklist was not in the plane and there was no evidence that it had ever been in the plane. This is a fact that goes again the position of the Petitioners, not the opinion of the Fifth Circuit. It was incumbent upon Petitioners to prove that they had not received the revised manual. The only proof on this point was that the manual was not in the plane at the time of the accident. There was clearly the possibility that it could have been received and either misplaced, lost, or simply ignored by Mr. Argubright. In any event, Mr. Argubright was duly obligated under the regulations of the FAA to have a current approved flight manual in the plane. (Tr. 204-207; 440:15-20.) 42 C.F.R. 91.31(b)(1).

Finally, the statement of the Fifth Circuit that the Petitioners' reliance on checklists undermined their contention that an additional warning was necessary is entirely correct. As already noted above, it is the duty of the pilot operating an aircraft such as that involved in the present case to obtain a current manual. The current manual contained the very checklist items that Petitioners contend should have been in the manual. Even if for some reason the manual was not in the plane at the time of the accident, Argubright had a duty to have it in the plane.

The Fifth Circuit's analysis of this case from a legal and factual standpoint was correct. The Petitioners have pointed out errors in semantics but not errors of a material legal or factual nature. In any event, as Petitioners

admit, not all of the alleged factual misstatements were even presented in their Motion for Rehearing to the Fifth Circuit.

C. CONCLUSION

The decision of the Fifth Circuit correctly determined Texas law under *Erie*. Petitioners' arguments disagree with the Fifth Circuit's determination under *Erie*. Petitioners, however, do not present arguments that reflect that the manner in which the determination was made was in violation of the rules set forth under *Erie*. In addition, the decision of the Fifth Circuit was in complete compliance with the dictates of the Seventh Amendment. Petitioners are in effect asking this Court to utilize discretionary review in virtually every civil personal injury case presented to a federal circuit court of appeals. Petitioners have wholly failed to establish any error in the application of the accepted standards of review dictated by the Seventh Amendment and therefore fail to present to this court an issue of constitutional dimensions. The Petition of Writ of Certiorari should therefore be denied.

Respectfully submitted,

COWLES & THOMPSON
4000 NCNB Plaza
901 Main Street
Dallas, Texas 75202
(214) 670-2100

By: _____
Michael W. Huddleston
State Bar No. 10148415

Attorneys for Respondent
Beech Aircraft Corporation